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THE

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THE LAW MAGAZINE.

ART. I.—PRACTICE OF THE SUPERIOR COURTS OF APPEAL.

A Practical Treatise on the Appellate Jurisdiction of the House of Lords and Privy Council, together with the Practice on Parliamentary Divorce. By John Macqueen, Esq., of Lincoln's Inn, Barrister at Law. London: A. Maxwell and Son; T. Clark, Edinburgh; and A. Milliken, Dublin. 1842.

"It would be of public service to have a just state of the true powers of the House of Lords in their judicial and legislative capacities, according to the true English constitution."—*Shower to the Reader in Ca. Par.*

We congratulate Mr. Macqueen and the profession on the appearance of a work which will be really useful to the one and does infinite credit to the other. The subjects have never before been systematically treated; and those members of the profession, whom fortune or inclination has led to practise in the Courts of ultimate resort, have long felt the inconvenience of having no safe guide to their proceedings.

This deficiency in our legal literature has now been most ably supplied, and we venture confidently to assert that, with the exception of the earlier efforts of Mr. Tidd, no treatise upon the dry but important subject of Practice has ever appeared in this country, which for arrangement, research, clearness and accuracy can compare with the volume before us. Occasional errors may be detected, but these could scarcely be avoided in a work like the present; for the faculties of the author must indeed have been remarkable, had they preserved an uniform vigour, while he examined with painful precision folio after folio of musty journals. We hope therefore that Mr. Macqueen will receive the following observations in the same friendly spirit in which they are offered; and we

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trust that the second edition of his work, which will soon be required by a judicious public, may show that he has adopted and improved the hints which we suggest.

The author commences his first chapter, respecting the Practice on Appeals, (p. 93,) by asserting broadly that "The only Courts in England and Ireland whose decisions are now subject to review by appeal to the House of Lords, are Courts of Equity." This is not literally true; since an appeal lies to the Peers from the intermediate judgments of the Lord Warden of the Stannaries, in cases not only where the Vice Warden has exercised an equitable, but where he has exercised a common law, jurisdiction. See 6 & 7 Will. IV. c. 106, ss. 5 and 7, and 2 & 3 Vict. c. 58, ss. 2 to 4. Indeed, Mr. Macqueen, in his Analytical Table of the Appellate Jurisdiction of the Privy Council, (p. 699,) has mentioned these very acts, and has alluded to the change they have effected, and therefore it is the more surprising that he should have omitted all notice of them in the natural place.

Again, at p. 362, in enumerating the Courts whose judgments are reviewable by the House of Lords under the form of a writ of error, Mr. Macqueen specifies "all such judgments of the Court of Queen's Bench in England as are not intermediately reviewable by the Court of Exchequer Chamber;" and at p. 368, he describes at some length the form of proceeding in such cases. We confess we know not to what judgments he alludes. It was at one time questionable whether the act of 11 Geo. IV. & 1 Will. IV. c. 70, s. 8, which created the present jurisdiction of the Exchequer Chamber, extended to judgments given in the Queen's Bench, either on indictments, or on writs of error from inferior courts; but these points have been decided in the affirmative by Rex v. Wright and Nesbit v. Rishton,[2] and we believe there is now no case in which error lies directly from the Queen's Bench to the Court of last resort.

A similar mistake has been made by the author (pp. 362 and 378) with reference to the judgments of the Court of Queen's Bench in Ireland. None of these are now directly reviewable by the Lords; one of the last acts of the Irish Parliament,

[1] 1 Ad. & Ell. 434. [2] 9 Ad. & Ell. 426.

40 Geo. III. c. 39, having expressly enacted that thenceforth it should not be lawful "to sue forth any writ of error, returnable directly to parliament, to reverse any judgment of the Court of King's Bench." Although a proviso was afterwards inserted that "nothing therein contained shall be construed to give a right to any person to sue forth a writ to reverse a judgment in which the king is a party, *other than as by law the same is now allowable,*" yet these words were probably intended to refer to writs of error in criminal cases, which, according to the best authorities, are not strictly writs of right, but merely writs of grace; at all events, they cannot be construed to restore a privilege which the former part of the statute had expressly taken away.

Again, at p. 373, the author, in treating of writs of error to Parliament from the judgments of the Commissioners appointed to review the proceedings of the London Municipal Courts, observes, "The writ will, I presume, be addressed to the senior member of the Commission in the usual terms. I have not, however, found any example of the form of such a writ of error." A form is given in Greene v. Cole,[1] in which the writ is addressed to *all* the Commissioners, enumerating each by name.

At p. 423, we find "that a judgment at law, being an entire thing, cannot regularly be reversed in part and affirmed for the residue;" and reference is made to Mr. Chitty's Archbold. Mr. Macqueen then, with a little hesitation, cites the case of Smith v. Shuldham, as tending to throw some doubt on this proposition. The doubt would have been materially strengthened, had he remembered that in Rishton v. Nesbit[2] the King's Bench in part reversed, and in part affirmed, the judgment of the Common Pleas at Lancaster; and this judgment was subsequently affirmed in the Exchequer Chamber.[3]

While discussing the doctrine of abatement, Mr. Macqueen thus notices the case of the Archbishop of Armagh v. The Attorney-General, (p. 428)—

"A writ of error was brought in the Court of King's Bench in England to reverse a judgment of the Court of King's Bench in Ireland. The original judgment was thereupon affirmed. [It was in fact reversed.] But on a writ of error in Parliament this judg-

[1] 2 Saund. 228. [2] 6 Ad. & Ell. 103. [3] 11 Ad. & Ell. 244.

ment was reversed; it appearing that the writ of error had been sued out in the reign of King George I., who died before the time when the writ was made returnable."

This is certainly a startling paragraph, as it is directly opposed to the salutary statute of 1 Edw. VI. c. 7, which, by enacting that all actions, &c. should continue notwithstanding the demise of the Crown, put an end to that vexatious ground for discontinuance, which the act very properly describes as "a great let and hindrance of justice." The case, however, as reported by Mr. Brown in the third volume of his Parliamentary Cases, p. 507, does not support the general proposition in the text, but merely decides that where the King is plaintiff in a writ of error, the writ is abated by *his* death, in like manner as by the death of any other sole plaintiff. The judgment indeed simply states, that "the writ of error was abated by the demise of his late majesty;" but it is clear, from the argument for the defendants in error, that the ground of the decision was as we have stated it; for their counsel urged that "the judgment was erroneous, because the sole plaintiff was dead before the judgment, which was given for the present king, though no party to the writ, and because this was a case not within the savings of any of the statutes."

We ought perhaps to apologize for noticing this last mistake at the commencement of a youthful reign.

In the chapter which treats of Ecclesiastical, Admiralty, and Prize Appeals, no notice is taken of the act of 3 & 4 Vict. c. 65, which was passed to improve the practice and to extend the jurisdiction of the Court of Admiralty, and which, by the 17th section, makes certain regulations for the admission of evidence in Admiralty appeals to the Privy Council, and especially for the reception of the certified notes of evidence taken by the judge or registrar of the Court below. The act of 3 & 4 Vict. c. 66, is also omitted, which, by section 4, provides that the Registrar of the Court of Admiralty shall attend the Privy Council at the hearing of all causes and appeals, which, before the passing of 3 & 4 Will. IV. c. 41, he was entitled to attend, and shall perform all necessary duties with respect to such causes and appeals.

In mentioning the act of 3 & 4 Will. IV. c. 41, which established the Permanent Judicial Committee, we may observe,

in passing, that at p. 687 it is twice erroneously cited by the publisher as c. 42.

Again, at p. 100 it is asserted, that "the last attempt made to induce the House to receive an appeal in the matter of a commission of lunacy, was in the case of Hume v. Rochfort, 15th Feb. 1759." But Mr. Brown, in the first volume of his Parliamentary Cases, reports the case of Rochfort v. Ely, where a similar application was made and refused on the 29th of Feb. 1768. The parties were the same in both appeals; but Rochfort, who was respondent in the former, was appellant in the latter.

We will here for a moment allude to a subject, which, though no longer of practical importance, is one of some antiquarian interest. Mr. Macqueen, in reference to the question, whether in the earlier periods of our history the House of Commons participated in the judicial functions of Parliament, asserts, that the negative "is redundantly established by the fact that, on the *deposition* of Richard II., they absolved themselves from all responsibility in respect of that proceeding, by recording the solemn protestation 'that the judgments of Parliament appertained exclusively to the King and Lords, and not to the Commons.'"—p. 3. In the title page, and again at p. 84, the author has copied from the Parliament Roll, 1 Hen. IV. No. 79, the exact words of the Commons, "Les juggementz du Parlement appertiegnent soulement au Roi et as Seigneurs et nient as Communes." Now it is remarkable that these words do not apply to the deposition of Richard II., for the Commons had their full share in that unconstitutional measure. Thus by turning to No. 15 of the Rolls, we find that the renunciation of the crown by Richard II. was read in full Parliament and admitted by all the estates, including the Commons. No. 51 tells us, that the articles of deposition were held sufficient by "the whole estates;" No. 54, that the Lords and estates on consultation assented to elect Henry Duke of Lancaster King; No. 56, that King Henry gave thanks to the whole estates; and Nos. 58 and 59, that certain commissioners, including "Sr̃ Thomas Irpyngham, Chaumberleyn, for all the Bachilers and Commons of this lond be Southe, Sire Thomas Grey for all the Bachilers and Commons be North, and Sire William Thirnyng and Johan

Markham for all the states," went to the Tower and pronounced sentence of deposition on the unhappy Richard. This took place on the 1st of October, but we learn from No. 76, that on the 27th of the same month, by the assent of the Lords Spiritual and Temporal (not including the Commons), Richard was adjudged to perpetual imprisonment. It was with reference to this most cruel and illegal sentence that the Commons recorded their protestation; and although, in support of the exclusive jurisdiction of the Lords, it must be allowed to have some weight, it certainly is not so conclusive and unanswerable as Mr. Macqueen appears to consider it. Construed, with reference to the subject matter, and this is the only fair and legitimate mode of construction, it merely amounts to an admission that the Commons were not entitled to interfere in criminal proceedings, and is by no means tantamount to an acknowledgment that they could not legally take part in civil matters, which were brought before Parliament on writs of error. When, therefore, during the disputes which arose in 1675 between the two Houses respecting judicial supremacy, this roll of Henry the Fourth's time was cited by the peers as proving "that the last resort of judging upon writs of error and appeals, in all cases and over all persons, was undoubtedly fixed and permanently lodged" in their House, we cannot but feel that the Commons were perfectly justified in replying that "it did not concern the case in question; for that this record was made upon occasion of judgment given by the Lords to depose and imprison their lawful king, to which the Commons were not willing to be made parties; and therefore the Commons conceive it not for the honour of your lordships to make further use of that record."

Had the deposition of Richard, instead of being the result of violence and usurpation, been warranted by his criminal conduct, the Commons would at least have had an equal right with the Lords to depose him; and it will be remembered, that in far later and better times, when the English constitution was thoroughly understood, the Lower House took an active part in the conduct of very similar proceedings. When, upon the flight of James II., the convention met in January 1689 to establish the revolution, it was the House

of Commons who first voted that the king had, by withdrawing himself out of the realm, violated the fundamental laws, and abdicated the government; and surely no one will now assert, that in passing this vote they outstripped the bounds of their legitimate duties, and encroached on the privileges of the House of Peers.

Mr. Macqueen, in a note to p. 3, "assigns the battle of Evesham (1265) as the true era, and Simon de Montfort as the genuine parent, of the House of Commons." The selection of this engagement as the event from which to date the existence of the Lower House, is certainly not happy, as it naturally leads the unlearned reader to imagine, that the citizens and burgesses were summoned to Parliament in consequence of that battle; whereas in truth the writs were issued some months before it was fought, and so far from its being in any way instrumental in occasioning or furthering the meeting of Parliament, it proved fatal to "the genuine parent," Lord Leicester, who was slain in the heat of the action.

Mr. Macqueen's language is in general distinct and manly; but here also a few sentences may be found, which the critic, without assuming the airs of a purist, may fairly pronounce to be of at least doubtful taste. Thus we read, at p. 658, of a gentelman who "occupied himself in constant *experiments* on the chastity of his female domestics;" at p. 537, of a counsel being "allowed to *lead* evidence;" and at p. 494, of an adulterer, "who may die, before any *steps* taken for the purpose of redress are *matured into fruition*."

Now we are on the subject of taste, we cannot refrain from denouncing the practice which has been too frequently adopted in modern times, of parading in a preface the names of eminent persons, "to whose kind and valuable assistance the author is deeply indebted." This custom may sometimes be traced to a childish vanity, which, conscious of the maxim, noscitur a sociis, induces the writer to seek a reflected distinction, by appearing to live on terms of intimacy with men of rank and talent; but it may more frequently be ascribed to a desire of enhancing the value of the work by the somewhat questionable means of a puff collateral. Now, acquitting Mr. Macqueen at once of being influenced by any ostentatious

motives, we cannot help seeing, nay, he has almost confessed such to be the fact, that in "acknowledging, with a sense of the deepest obligation, the lights and advantages afforded to him" by Lord Brougham, the Lord Justice Clerk, and Lord Devon, he has sought to confer on his work "the stamp of official authority." This however he has failed in doing. Not that the noblemen he mentions are incapable of affording him assistance, since the two former, in reference to the laws of their respective countries, are as competent as any men in the kingdom to furnish valuable information, and Lord Devon might give some useful advice; but as we know neither what interest their lordships took in the work, nor what time or attention they bestowed upon it, we cannot allow much weight to the *possible* amendments they may have made. Personal experience has taught us too plainly, that the matured opinion of a man of only ordinary understanding, on a subject to which he has paid particular attention, is, at least in the science of the law, a far surer guide than the unstudied hints which are suggested off-hand, by persons of the most brilliant abilities and the most profound experience.

In the chapter on costs, the author contents himself with stating the grounds on which they are granted or refused, and the means by which they are recovered, &c., and omits all mention of their probable amount. As a writer on principles, he was correct in making this omission; but as a practical guide, he would have conferred a greater benefit on his countrymen, had he furnished them with some data by which they might collect the average expense of prosecuting with effect a writ of error or an appeal. A gentleman, on taking his seat in the House of Commons, was overheard not long since indulging in the following soliloquy: "I began life a rich man; I have stood three contests, and am at length successful. Well, my fortune is still sufficient to qualify me for a member, and, thank God, my opponent has not got a shirt to his back." If the costs of proceedings in Courts of last resort had been stated in the Treatise before us, the public might have learnt, what is known to the profession, that in this free and enlightened country, it is not at the hustings only that fortunes may be lost.

In one respect Mr. Macqueen deserves our unqualified praise; we speak of the straightforward and independent manner with which he has advanced his own views, not only where the law is doubtful, but where he thinks it unsound. That this is the duty of every text writer there can be no doubt, but unfortunately few have courage to perform it. The greater number of legal compilers, with whom we confess we have no sympathies in common, are determined, as they assure the public, to avoid the charge of presumption, and therefore venture to express no opinion of their own. Satisfied with leaving the law uncertain and unjust as they found it, they cloak their inability, their ignorance, and their sloth under the convenient garb of an unreal modesty. The scissors are employed more than the pen, and the pen more than the head. To borrow the language of Politian, "Nisi liber ille præsto sit ex quo quid excerpant, colligere tria verba non possunt."

With the opinions of Mr. Macqueen we do not always agree. Thus, when he complains at p. 13, note (*q*), that the ancient rule for appointing Les Receivours et les Triours des Petitions de Gascoigne, &c., in the House of Peers, has not in modern times been accurately adhered to, and founds his complaint on the notorious fact that "the appointment of these functionaries is but a form," we feel inclined to ask why such an absurd and useless form is still continued at all.

So when, at p. 411, he commends the 13th rule of H. T. 4 Will. IV. which provides that, in the Exchequer Chamber, if the defendant declines to plead within twenty days after demand, the judgment shall be reversed; and when he further suggests that the same consequence might conveniently follow on writs of error in the House of Lords, we join issue upon the substantial justice of the rule itself. Why should the defendant be driven to proceed in a costly litigation? "He has the decision of the Court below in his favour. He considers that decision sound; and he may be unwilling or unable to sustain the expense of a new contest in a new Court with reference to the same subject-matter. Primâ facie, therefore, his absence is evidence of his confidence in the merits of his cause, rather than of any contumacy or disrespect to the authority of the Court." These arguments, which we borrow from Mr. Mac-

queen, have been urged with success by respondents both in parliamentary appeals, and in appeals before the Privy Council. Such parties are not now required to put in any answers; and the only consequence of their disregarding the peremptory order to appear, is, that the appellants are entitled to have their causes set down for hearing ex parte. See pp. 163 and 716.

We confess ourselves unable to discover any sensible distinction between the case of a respondent in an appeal, and that of a defendant in a writ of error.

Although in these instances, and in a few more that might be cited, we are forced to differ from Mr. Macqueen, we feel much satisfaction in declaring our cordial agreement with most of his opinions; and as we would gladly be considered fellow-labourers in the vineyard of legal reform, we shall close this article by drawing the attention of our readers to one or two amendments he suggests, and perhaps by offering an occasional hint with respect to other alterations which he has not advised. In acting thus we shall purposely disregard the servile doctrine of Sir Bartholomew Shower, who, in 1698, thought it becoming to declare that "the errors in the exercise of the Lords' judicature (if any) are only to be corrected by themselves, and are noways proper or fit to be suggested by any private person, much less to be published in print."

The first subject which naturally arrests our attention, and to which Mr. Macqueen has only made incidental allusion, is the constitution of our Courts of ultimate resort; and here we may ask with some confidence, whether there is any person in the kingdom who is really satisfied with the House of Lords as a Court of Appellate Jurisdiction? The multitude, who look merely to the practical working of a system, complain, and with reason, of the enormous expense and oppressive delay attendant on having recourse to this august tribunal; while the reflecting few recognize a contingent danger of collision in the existence of two independent Courts of co-ordinate power,—object to the theoretical tyranny of vesting in the same body of men a divided power of making, and an absolute power of interpreting, the laws,—and question the expediency of allowing a class, irresponsible from their numbers, and inefficient from their want of professional experience,

finally to decide on questions which have perplexed the practised understandings of the soundest lawyers.

Of these objections, the first will not be answered, for it is unanswerable; but to the last three it will perhaps be replied, first, that no collision has yet taken place between the House of Lords and the Privy Council; secondly, that suitors obtain substantial justice from the present House; and thirdly, that in fact unprofessional peers do not attend the hearing of causes, which are really decided by those members alone who either hold, or have held, high judicial appointments. We will examine the validity of these answers in detail.

First, as to collision. We admit our inability to cite any instance of actual collision between these two Courts of dernier resort, but we contend that the argument is not weakened by this accidental circumstance; for, in the first place, the Privy Council in its present efficient form has existed for so short a period, as to furnish no safe ground for assuming even the improbability of future contest; and secondly, let the improbability be ever so great, it is sufficient for our purpose that a possibility exists. We need not here allude, with Lord Campbell, to the recent contest between the Court of Queen's Bench and the House of Commons, or to the struggle still sustained in Scotland between the civil and ecclesiastical authorities; neither is it necessary to refer to what Mr. Macqueen calls "the unseemly and protracted altercation which took place upwards of a century ago between the English and the Irish House of Lords;" or to the still more angry disputes which, during the latter end of the seventeenth century, in the memorable cases of Crispe v. Dalmahoy, Stoughton v. Onslow, and Sherley v. Fagg,[1] inflamed the passions of the Lords and Commons of England. It will readily be admitted on all hands, that such disputes have frequently arisen between Courts of co-ordinate sway, and have uniformly tended to weaken the authority of the law, and to degrade the administration of justice; and when we learn from the work before us, "that although an appeal from an order made on *petition* in lunacy lies to the Queen in Council, yet an appeal from an order made on a *bill* filed in lunacy, in the regular course of

[1] See Index to Journals of Dom. Proc.

equitable jurisdiction, lies to the House of Lords" (p. 754); we see how possible it is, that, even on the same subject-matter, the two Courts of last resort may arrive at diametrically opposite conclusions. We conceive, therefore, that this possibility of collision is a grave objection to the constitution of these Courts as they at present exist.

The argument which relies on the assumed fact, that substantial justice is now duly administered by the Lords, will give us little trouble. It is an argument ad homines,—alike ungracious to dispute, and safe to admit; which can have no bearing on the general question, and will as readily consecrate tyranny in the person of the Emperor Trajan or the Czar Alexander, as support the judicial authority of the House of Peers by referring to the character and conduct of its living members.

The fact is, the functions of the legislator and the judge are inconsistent, and the qualities requisite to perform them are opposed. The judge asks what the law *is*—the legislator, what it *ought* to be; and the habit of mind which these questions respectively induce is so different, that it rarely happens that a person accustomed to the train of thought belonging to the one character, can successfully assume the sentiments which are natural to the other. The judge indeed may with greater facility become a legislator, than the legislator a judge; because the judge, by constantly expounding the existing law, must at least become thoroughly acquainted with its leading defects, though he may not be competent to appreciate them fully, or to suggest the fitting remedies; whereas the legislator, however capable of creating an admirable new system, does not necessarily possess the least practical knowledge of the old one; and in every attempt to perform the judicial duties, feels an habitual desire to rely on his own judgment, and to decide in accordance with his private notions of positive justice, rather than to follow in the beaten track of precedent and authority.

We now come to the argument that unprofessional Peers interfere little in the judicial business of the House, and we give such weight to it as at once to declare with Lord Brougham, that if this were not the case, the High Court of

Parliament "would be, according to the letter of the constitution, one of the most absurdly framed judicatures in the world;"[1] but the question still remains, what is to insure their non-interference? If a party of young noblemen, after a night passed in every fashionable variety of dissipation, were suddenly to choose for variety the office of judges, and, in pursuance of their merry conceit, were to adjourn from Crockford's to Westminster, and there, after gravely listening to the logical argument of the learned Solicitor-General, were, in opposition to the views of the few law lords present, but in the legitimate exercise of their undoubted privileges, to overrule the unanimous decision of the Court of Exchequer Chamber, what could restrain them from acting in this manner? The constitution could not, since it recognizes the right of every peer to assist in the judicial business of this tribunal of last resort, and indeed four hundred copies of each case are printed and delivered expressly for the use of the multitudinous judges. Public opinion would be equally inoperative; since, without going back to the profligate times of Charles the Second, examples have not been wanting, even within the last few years, to show that to some members of the aristocracy, feelings of decency and propriety might be of little value when weighed in the balance with their own vagrant fancies. We have had, and might have again, choice spirits, who, in contempt of all public opinion, would exclaim with the licentious Roman bard,

> "Vivamus, mea Lesbia, * * *
> Sermonesque senum severiorum
> Omnes unius æstimemus assis."

Now, without pretending to rely on the extreme case we have just put, further than as it illustrates the theoretical absurdity of a court so constituted, we can well imagine that cases might be brought before the House of Lords, in which strict justice would be made to succumb to personal feeling or political expedience; for though we should forbear to make any allusion to the startling decisions of some Election Committees of the Lower House, the conduct of the peers themselves not many years back, in one or two questions of divorce, has given us

[1] Speeches, vol. iii. p. 449.

too certain an indication that such an event is at least not impossible.

The ever-varying constitution of the Court, viewed practically, is another grave objection. There may be four or five law lords; but we are never sure of more than one, unless indeed the Chief Justice of the Queen's Bench is henceforth to be always made a peer; an innovation of doubtful expediency. How can such a court be constantly qualified to review the decisions of such a tribunal, for instance, as the Exchequer Chamber, composed of eight judges of the superior Courts?

Having endeavoured to show in our preceding observations that the constitution of our courts of last resort is absurd in theory and unsatisfactory in practice, it remains to be seen whether any alterations can be suggested which the legislature may beneficially adopt. Here we acknowledge with pleasure how much we are indebted to Mr. Macqueen, who, by referring to the Rolls of Parliament, has proved to demonstration what Lord Hale had long since asserted, that the Privy Council in ancient times were the constitutional assistants of the House of Lords. In the scheme, therefore, which we are about to propose, we shall in no way shock the prejudices of that respectable body of men, who, reverencing the institutions established by their forefathers, look with reasonable suspicion on all organic change. We wish to see the two courts of ultimate resort blended into one; and with this view, we propose that all appeals and writs of error, which now lie either to parliament or to the Privy Council, shall in future be *nominally* brought in the House of Lords, but be *directly* decided by the Judicial Committee; or, in other words, the members of the Judicial Committee shall constitute, in themselves, the permanent assistants of the Peers, and shall perform, in their name, all their judicial functions. It will be said that this is in fact to abrogate the judicial power of the House of Lords, and to leave nothing to that tribunal but the empty title of a Court of Justice. Be it so. The sovereign, in the High Court of Chancery, in the Court of Queen's Bench, and in the Privy Council, as at present constituted, enjoys no real authority, and has nothing but an empty title; yet our monarchs in ancient times presided in those courts, and performed in person the real duties of the

present judges.[1] The question is, whether, by the transfer we propose, ultimate justice would not be obtained more surely, more speedily, and more cheaply than at present. We are firmly persuaded that it would; and if this be so, we are as firmly persuaded that the public would sanction and rejoice at the change.

Still the Privy Council is not without its defects, and we hasten to point out some of the most remarkable. "In the first place," to adopt the language of Mr. Macqueen (Preface, x), "it is clear that some member of the legal profession ought to preside in it. To this proposition, originating with Lord Cottenham, all parties assent." Indeed, there is one man so pre-eminently qualified to fill that high judicial position, that we are astonished it has not already been offered to him. We are aware that the knowledge of the noble and learned lord to whom we allude is rather discursive than accurate, and his mind more ingenious than judicial, and we admit that in any tribunal where the common law, or equity, or the civil or canon law, is singly considered, he would rank second to many we could name. Still, in a Court where questions on all these laws, and indeed on almost every known code throughout the world, are in turn discussed, and where, moreover, the chief judge is supported by able coadjutors, these imperfections in the President cease to produce a prejudicial effect. Political animosity must strangely blind us as to all excellence, if we did not recognize the varied information and vast grasp of intellect, which have rendered the gifted person of whom we speak one of the most remarkable men of this or of any age.

In pointing out the next defect, we again quote from the work before us, Preface, p. x:

"An attempt should also be made to insure greater regularity and uniformity in the sittings of the Court. It was observed by the late Mr. Miller, who practised before it, that 'as almost all the members who attend have other duties to perform, the days of attendance which would be convenient to some of them almost invariably prove inconvenient to others. This creates unceasing consultations and proposals for mutual accommodation, the greatest consequent uncertainty with respect to the duration and days of the sittings, perpetual applications from parties for advancing causes,

[1] Edward the First frequently sat in the King's Bench on important occasions, Burr. 851,852; and Lord Coke, 12 Rep. 64, cites a curious dialogue between James the First and himself, in which the king claimed his ancient prerogative.

and negociations between them and the Court about the order in which causes shall be heard.' "[1]

The best, and indeed the only mode of remedying this evil, is to increase the members of the Judicial Committee: a step which will become the more necessary, as, by the adoption of our plan, the business of the Court will be nearly doubled. We would therefore suggest that the following persons might with prudence be added to the present force of the Judicial Committee: first, the Lord Chancellor, the Lord Keeper, and the Chief Justice of the Queen's Bench of Ireland; secondly, the Lord President of the Court of Session and the Lord Justice Clerk of Scotland; lastly, all persons who, continuing members of the Privy Council, shall have held any of these offices.

If, in addition to these alterations, it were arranged that in future three judges instead of four should sit in each of the Common-Law Courts, the business of those Courts would be as efficiently performed as at present, and the services of three judges might thus be secured for the Judicial Committee at all times of the year, except during the continuance of the assizes. When it is remembered that the most important judicial questions mooted in England, whether regard be had to the principles involved, or to the amount of property at stake, are daily decided in courts of equity by a single judge, it certainly does appear altogether unreasonable, that in courts of common law the most trivial matters are constantly heard before a tribunal consisting of four judges of the land. The waste of public time and of intellect occasioned by this absurd system can only be duly estimated by those persons who have the opportunity of witnessing its practical results.

We need not here do more than notice in general terms the needless delay and expense, which is now occasioned to the suitor, by the circuitous mode of obtaining a decree in the Privy Council. If the Court be re-modelled in the manner we have ventured to suggest, the record will simply follow the direct language of the judgment, and will no longer, as at present, be thrown into the shape of a report to the Queen, which must be forwarded to the royal residence for the time being, in order to obtain her Majesty's formal confirmation.

Much of what we have here advanced has been urged in

[1] Miller on the Law and its Administration, p. 111.

higher quarters with far greater ability than we can ever hope to display; and we only repeat these arguments from a firm persuasion that they are founded in common sense, and in a pardonable belief, that, as every drop of water which falls upon the rock imperceptibly wears it, so even our feeble exertions will produce some slight effect in promoting the improvement of our judicial system.

We now turn to subjects of minor interest.

According to the ancient practice in appeals throughout the empire, the dependence of a cause in Parliament did not stay proceedings in the Court below (see p. 230 and 291); but at the commencement of the last century a contrary doctrine prevailed with reference to English and Irish appeals (p. 233), and unless permission to proceed was expressly granted, the receiving an appeal in the Court of last resort, was held effectually to hang up the cause. Shortly after the union with Scotland, the House of Lords, by an order made the 9th of April, 1709, adopted this mischievous rule in appeals from that country; and although a return to the original practice was, about sixty years ago, effected in English and Irish causes, no corresponding change took place in appeals from the Court of Session. The evil consequences, however, of allowing a defeated party fraudulently to suspend execution for years, by merely entering an appeal, which he never intended to prosecute, became at length so apparent, that the legislature thought it necessary to provide a remedy; and, accordingly, after the expiration of a century, an act was passed in 1808, forbidding Scotch appeals from interlocutory judgments, except with the leave of the judges below, or where their lordships should entertain a difference of opinion. The right of appeal was thus improperly curtailed, because, by the faulty regulations of the Court of Error, the advantages attendant on its exercise had rendered it liable to abuse; and although the statute has given the judges below a discretionary power "to regulate all matters relative to interim possession and execution, and payment of costs and expenses already incurred," yet, as Mr. Macqueen very properly observes (p. 325), "This remedy fails entirely in two cases frequently occurring; namely, in the first place, where an appeal is resorted to before the sum decerned for has been fixed by adjudication; and,

in the second place, where expenses or costs, awarded by the Court below, are left unascertained, by the interlocutors submitted to review. In either of these cases, interim execution may be evaded; for the statute gives no authority to fix what has not been fixed, or to ascertain what has not been ascertained, by the interlocutors appealed from; and the order of 19th April, 1709, prevents the Court of Session from doing anything proprio vigore." The author then suggests that this order should be rescinded, and that henceforth "the general liberty of proceeding in the Court of Session during the dependence of the appeal, might be placed on the same footing as in English and Irish causes." There are probably few persons, who will not, on consideration, acknowledge the soundness of this advice. We would also venture to suggest that a writ of error should in no case operate as a supersedeas of execution, provided the successful party in the Court below will give satisfactory security for restitution, should the judgment be reversed. The Act of 6 Geo. IV. c. 96, which provides that the person suing out the writ shall enter a recognizance, with sureties, for the payment of all costs and expenses in case of ultimate defeat, affords but a partial remedy against the evil of allowing litigation to be protracted, and just debts withheld, by means of groundless appeals.

In explaining the practice of the judicial committee of the Privy Council, Mr. Macqueen observes at p. 719—

"It occasionally happens that the appellant, after having lodged his petition of appeal in the Privy Council Office, fails to deliver in his printed case; that is to say, fails duly to prosecute his appeal.

"The remedy of the respondent under such circumstances will be by petition to the Queen in Council, praying dismissal of the appeal with costs; but it is said that before the respondent can have the benefit of the petition, he must first deposit his own printed case in the Privy Council Office."

He then makes the following judicious remarks:—

"It is not very easy to see the object of this regulation, which subjects the respondent to perhaps a heavy expense, without any corresponding benefit to himself, to the Court, or to his opponent. The prayer of dismissal rests on the ground simply of want of prosecution. But how can that ground be fortified by the printed case of the respondent, which relates, not to the want of prosecution (the

only point requiring consideration), but to the merits of the cause; which, however, are not before the Court upon such application for dismissal?".

What would the profession think of a rule of Court, which should render it incumbent on a defendant, before moving for judgment as in case of a nonsuit, to file affidavits disclosing the merits of his defence? and yet this is precisely an analogous rule; the only difference being that the affidavits might be prepared at a hundredth part of the costs of printing the case. Indeed, we go further than Mr. Macqueen, and very much doubt the expediency of requiring any petition for dismissal from the respondent, in cases where the appellant has made default in prosecuting his appeal. By the practice of the House of Lords, if the appellant fails to deliver his printed case within the appointed time, the appeal stands absolutely dismissed. (See p. 183, and Standing Order, No. 177.) Why should not this rule be adopted by the Privy Council?

Turning to that part of the work which treats of Writs of Error, we find that the writ is procured in the following manner: first, the attorney for the complainant makes out a precipé, which he takes to the Clerks of the Petty Bag Office, who thereupon prepare a petition, and present it at the Office of the Home department; "whence," as Mr. Macqueen observes, "in due time, a warrant issues in her Majesty's name, signed by the Secretary of State, complying with the prayer of the petition. This warrant is the authority upon which the Clerks in the Petty Bag Office proceed to prepare the writ of error, which is made out and sealed at the next general seal; or, if expedition be required, at a private seal." (p. 366.) If the Crown is a party to the record, not only must a certificate of counsel be obtained, stating that in his opinion there is ground for complaint, but the fiat of the Attorney General must also be procured; and if the cause comes from Scotland, the additional fiat of the Advocate General is required. Here are seven preliminary steps to be taken, and at each step the unfortunate complainant is requested, with provoking politeness, to "stand and deliver." Yet the admirers of our constitutional law proclaim with exultation, that a writ of error, except in treason or felony, is the undoubted *right* of a British subject! Surely these cir-

cuitous and expensive proceedings might with great advantage be curtailed, and writs of error might be allowed to issue at once from the Petty Bag Office, on application being made for that purpose. We remember an old lady who contrived to keep her large family constantly employed by issuing her instructions in somewhat of the following form: "Henry, my love, run upstairs and tell Lucy, that I wish she would go to the breakfast-room to tell Emily, to ring the bell and desire the butler to send Thomas with some coals, for my fire is nearly out;" but we never heard that her grate was better supplied than if she had herself pulled her own bell, which was within reach of her arm.

Another point connected with Scotch writs of error requires, as we humbly contend, a speedy amendment. By an act passed in 1820, 1 Geo. IV. c. 68, s. 9, writs of error from Ireland, with the transcripts and judgments, made up in the form of returns, are directed to be signed by the chief justice of the Queen's Bench, the clerk of the errors, and the under secretary, or chief clerk of the civil department; and this last-named officer must transmit them by post, and without charge, to the proper officer of the Lords' House of Parliament (see p. 379). But in Scotland, the writ and record, being first endorsed by those judges, who, under 2 & 3 Vict. c. 36, are now authorized to perform the duties of the Court of Exchequer, are sealed up, and the parcel is then delivered to some person, who must come to London, and himself deliver it at the bar of the House of Lords, upon oath that it remains in the same state as when he received it. (See pp. 383 and 386, 387.) This practice of despatching the record by a special bearer, when it might be forwarded with at least equal safety by the post, will, we believe, find no advocate except the clerk of the Edinburgh agent. He, of course, will warmly defend a system, which affords him so convenient and lucrative an opportunity of migrating to the south during the spring months, of passing a fortnight or three weeks in utter idleness at Morley's Hotel, in consequence of "a provoking" but anticipated adjournment, and of imbibing, at the expense of his client, nightly potations of whisky-toddy to the success of the "guid cause."

It should also be remembered, that in all these causes from

the Scotch Court of Exchequer, the Queen is of necessity a party, and therefore the costs incurred by this useless messenger must fall on the complainant, whether he succeeds or fails; since it is *beneath the dignity* of the Crown to pay costs.

The anomalous condition of the law, as it limits the time for bringing an appeal or a writ of error, deserves also the serious consideration of the legislature.

By the standing order of the House of Lords, No. 118, no appeal from any English or Irish decree can be received by the House after the first fifteen days of the sessions next ensuing two years from the signing and enrolling of such decree; unless the person entitled to appeal be under age, covert, insane, imprisoned, or out of Great Britain and Ireland; in either of which cases, the time shall be calculated from the removal of such disabilities; but in no case shall more than five years from the date of the decree be allowed on account of absence. (See p. 108—110.)

The same rules prevail as to appeals from the Commission of Tiends and the Scotch Exchequer (p. 296); and the act of 6 Geo. IV. c. 120, s. 25, which limits the time for bringing appeals from the Court of Session, contains very similar provisions. It however enacts, that, in the event of the death of persons under age, or insane, the period of two years shall be allowed to their heirs and representatives; and very wisely declines making any exception in favour of persons covert or imprisoned (p. 298). It may indeed be very fairly doubted, whether it be advisable to allow further time on account of any disabilities. It is scarcely conceivable, that a person's absence in foreign countries should render him ignorant of a decree pronounced against him for a period of two years; and it is only on the ground of ignorance that his claim to indulgence can be sustained. So, also, if the committees of lunatics and the guardians of children can so far represent their interests, as to institute proceedings in the Court below for their protection, it is surely not too much to require that they should also exercise a conclusive discretion on the expediency of abstaining from appeals.

In the Privy Council no disabilities are allowed, but the time for appealing has various limits; in Jersey, being confined to three months; in Guernsey, to six months; and in

most other cases to a year and a day from the date of the sentence. (See pp. 699—704.)

Then in writs of error, the complainant may proceed, under the provisions of the Act 10 & 11 Will. III. c. 14, at any time within twenty years from the date of the judgment; and in cases of disability, even that period is enlarged.

Now, whatever may be the opinions of the profession on this subject, we believe that the public, in recognition of the ancient doctrine, "Interest reipublicæ ut sit finis litium," would be fully satisfied, were it determined, that, in future, all decrees and writs of error must be brought within two years from the date of the sentence. This was the period fixed by Lord Brougham, in the bill he presented in 1834, for the amendment of the appellate jurisdiction of the House of Lords.

The chapters which treat of parliamentary divorce, illustrated, as they are, by a judicious selection of leading cases on that branch of the law, contain the most interesting, if not the most important, matter in the work before us; and we intended originally to examine them at some length in this place. Feeling, however, that we should do little justice to the subject, were we to introduce it at the fag end of an omnibus article, we have determined here to close our remarks, and shall reserve for a separate discussion the law of marriage and divorce.

J. P. T.

ART. II.—OFFICERS OF THE COURT OF CHANCERY.

A Catalogue of Lords Chancellors, Keepers of the Great Seal, Masters of the Rolls, and principal Officers of the High Court of Chancery. By Thomas Duffus Hardy, Assistant Keeper of the Public Records. London: Butterworth. 1843. Royal 8vo.

It may startle some of our readers to learn that the title, Chancellor, now borne by "an officer" (to use the words of Blackstone) "of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedency to every temporal lord," was first borne by an

officer who appears, according to the earliest authorities, to have been invested with the lowly functions of doorkeeper. Cassiodorus, who wrote in the sixth century, tells us that the chancellor was the usher who opened and closed the doors of the tribunal where the judges sat, and that he announced to the people the decisions and orders of the Court.[1] An earlier writer than Cassiodorus, Vopiscus, who flourished in the early part of the fourth century, states that the Emperor Carinus, "præfectum urbi unum ex cancellariis suis fecit, quo fœdius nec excogitari aliquando poterat nec dici." So insignificant an office was the cancellarius, or usher of the empire! Though the office of cancellarius had not at that time attracted to itself those duties which it subsequently exercised, there is no question that the duties themselves were performed by functionaries under different titles.

During the imperial sway of Augustus and his immediate successors, the duties which have belonged to the chancellorship in later times, were exercised by the quæstor and prætorian præfect.

In the name of the emperor, the quæstor composed the documents which had the force of edicts. He was considered as the representative of the legislative power, the oracle of the council, and the original source of civil jurisprudence. He occasionally sat in the supreme judicature of the imperial consistory with the prætorian præfect, and assisted him in resolving the doubts of inferior judges.

But the greater and more absolute power appears to have been wielded by the prætorian præfect. To him belonged the supreme administration of justice and finance. As the direct representative of imperial majesty, he had authority to explain, enforce, and occasionally even to modify, the general edicts, by proclamations dictated at his discretion. The rights of widows and orphans were subject to his immediate protection and superintendence. An appeal in every matter of importance, either civil or criminal, might be brought before his tribunal, from all inferior jurisdictions; final and absolute was his sentence. Even the emperors themselves refused to admit any complaints against the judgment or the integrity of a functionary whom they had honoured with such un-

[1] Wooddeson (Sect. 6) states that he had the care of the *cancelli*, or latticed doors leading to the presence chamber.

bounded confidence. Subsequently, an officer called the referendarius exercised several of the functions which had appertained to the quæstor and prætorian præfect. The principal occupation of the referendarius was to apprise the sovereign of the petitions of suppliants, of the decisions of magistrates, and to communicate answers to the parties interested. He also framed the public edicts of any moment, and corroborated them by the royal signet, of which he always retained the custody for that especial purpose. During the early reigns of the kings of France of the first race, the referendary had the custody of the royal ring or signet, and the office was conferred on any person by the fact of the delivery of the signet. This custom has descended to our own times. The chancellor (who in most respects is the representative of the referendary) assumes the office by having the delivery of the seal made to him in every kingdom in which there is such an officer.

Among many nations, and from periods the most remote, a ring or signet has been received and acknowledged as the representative of its possessor: "And Pharaoh took off his ring from his hand, and put it upon Joseph's hand." (Genesis, xli. 42.) In the East, the custom still prevails, and even in the latest Eastern romance which came before us, Mr. Fraser's "Allee Nemroo," the hero is twice saved from destruction because he is the holder of the signet of supreme authority.

Before the close of the eighth century, the office of referendary appears to have merged into the offices of the chancellor and notary; but the chancellor retained the most important functions, whilst those of lesser moment descended to the care of the notary.

During the Anglo-Saxon period there seems to be no doubt that such an officer as a chancellor existed, though it would be difficult to find precise authorities to the fact. The passages cited by Sir Edward Coke,[1] who is decidedly wrong in his notions of the origin of the name, cannot be sufficiently relied upon; if they could, the chancellor's functions might easily be determined.[2] He probably acted as chief scribe or

[1] 4 Inst. 78.

[2] In confirmation, however, of Lord Coke's (4 Inst. 88) derivation of the title of chancellor, "Cancellarius, a cancellando, à digniori parte, it being the highest

secretary of state. There is much presumptive evidence that he did not hold any royal signet as the badge of his office; Mr. Hardy asserts positively that the seal was not used for the authentication of documents anterior to the reign of Edward the Confessor.

"The employment of seals amongst the Anglo-Saxons," says the author of the Rise and Progress of the English Commonwealth, "has given rise to much discussion. There can be no doubt but that seals were used for the purpose of impressing the wax which closed the Epistles of the Anglo-Saxons. The seals of Edgitha, Abbess of Wilton, and Ethelwald, Bishop of Dunwich, are still extant. The point at issue, however, is not whether seals were in use amongst the Anglo-Saxons, but whether the usage of appending a seal to a charter was considered as a legal method of executing the instrument according to the custom of later times. In the reign of Ethelred the Anglo-Saxon kings issued letters under their seals, and in the reign of Edward the Confessor, the 'gewrit and insegel' was the customary mode of confirming a dignity, of bestowing the king's protection, or of signifying his commands. But the

point of his jurisdiction to cancel the king's letters patent under the great seal, and damming the enrolment thereof, by drawing strokes through it like a lattice," we refer our readers to the Lords' Journals, vol. i. pp. 483—4, which afford a singular instance of the lord chancellor's exercise of his duty in cutting a clause from an act of parliament:—

"Die Veneris, videlicet, 4° Januarii, 1 & 2 Ph. & Mary, 1554.

"Hodiè allatæ sunt à Domo Communi tres billæ, quarum—

"Prima," &c.

"Secunda," &c.

"Tertia. Repealing all statutes, articles, and provisions made against the See Apostolic of Rome since the 20th year of King Henry the Eighth; and for the establishment of all spiritual and ecclesiastical possessions and hereditaments conveyed to the laity; with two new provisoes added thereto by the Commons; and also a request that the two clauses, containing nineteen lines, and concerning the Bishops of London, &c., and the Lords Wentworthe, &c., should be clearly put out. Whereof one of the provisoes, for the manner of penning thereof, being misliked to the House, another to the same effect was commanded to be drawn, which being three times read, and agreed unto by the whole House, except the Viscount Montacute, and the Bishops of London, Covent' and Lichef', was sent down to the Commons, where being also thrice read and agreed unto, it was brought up again, as an act fully assented unto by both Houses; nor the said nineteen lines were *not razed* nor taken out of the Act; but the Chancellor, in the sight of all the Lords, with a knife, cut them, saying these words, '*I now do rightly the office of a Chancellor.*'"

seal, though it might be added to a charter, was not indispensable to the validity of the instrument. And though the impression of the king's effigy was probably considered as imparting more than ordinary solemnity to the document, still the practice did not possess the uniformity and constancy of a legal custom, and it gained ground only by slow degrees. William the Conqueror had a great seal, which was occasionally employed by him, yet he frequently confirmed his charters by his sign or cross alone; and until the reign of Henry II., the privilege of using a seal scarcely extended to any but the greater barons. Gilbert de Baillol, the lord of the fee of certain lands, contested in the Curia Regis, exclaimed that many chirographs in the names of his ancestors had been read in his hearing, but that their deeds were not fortified by the testimony of their seals. Richard de Luci, the Justiciar, inquired if *he* had a seal. Baillol answered in the affirmative. The justiciar replied, with a smile of contempt, 'It was not the custom in the olden time for every *knightling* to use a seal, which is fitting only for princes and persons of rank and dignity.' On the Continent, the seal had been employed since the days of Dagobert, but the Confessor departed from the pattern of his contemporaries, the waxen impression being pendant to the charter, whilst the diplomatic etiquette of France required that the wax should be applied upon the parchment like a modern wafer-seal."[1]

It is not until the series of Chancery Records begins, in the reign of King John, that we are enabled to speak with much precision of the office of the English chancellor, or his duties. We know from the monkish chroniclers that during the reigns of the first five kings after the Norman Conquest the chancellor was usually a bishop or eminent ecclesiastic. But from the beginning of the thirteenth century to the present day our national records enable us to give the name and date of every appointment of chancellor, and to identify with complete precision every keeper of the great seal, who, until the time of Elizabeth, was not ipso facto the chancellor.

We judged it right, before we entered upon an examination of the very curious work which heads this article, to give a brief sketch of the history of the office of chancellor, who

[1] Proofs and Illustrations to Palgrave's English Commonwealth, p. ccxvii.

may be considered to be the germ of that institution which takes its name from him.

Mr. Hardy promises a History of the Officers of the High Court of Chancery, a work which, we have no doubt, will be welcomed by all who are interested in that subject, whenever he may see fit to publish it.

To this proposed work the present list of chancery officers may be viewed in the light of an appendix, and the reasons for its appearance preceding that of his larger work, Mr. Hardy explains in his preface.

The present Master of the Rolls, it appears, had himself prepared a list of lords chancellors, lords keepers of the great seal and masters of the rolls, when he became acquainted with Mr. Hardy's labours in the same direction; whereupon Lord Langdale placed the whole of his collection of manuscripts relating to this subject in Mr. Hardy's hands, "with permission to make any use of them he might think proper;" and Mr. Hardy, partly as an acknowledgment of Lord Langdale's liberality, and partly from an apprehension that his larger work might be protracted over much time, determined to print these lists of officers separately.

This work embraces the names of all the officers of the Court of Chancery, from the lord chancellor down to the secretaries of the vice-chancellors, each class of functionaries beginning with the earliest known appointments of them. It possesses a superior value to other similar compilations, arising from the very copious explanatory notes, which the editor's lore in the Public Records enabled him to supply, and which, indeed, no one not possessing similar opportunities and experience, could possibly have furnished. In addition to these notes, the authority for placing every name in the catalogue has been given; and this authority in all cases, after the beginning of the reign of King John, is a reference to the record itself. From the prefatory notices of each office, and from the notes which accompany each list of officers, we shall now present a brief compilation, exhibiting the history of each office of the Court of Chancery.

In the outset, it is necessary to bear in mind that the offices of lord chancellor and lord keeper of the great seal are not synonymous.

The notes, which Mr. Hardy has collected, show, as he

states in his preface, that "before the statute which was passed in the fifth year of the reign of Queen Elizabeth, for declaring the authority of the lord keeper of the great seal and the lord chancellor to be one," and "that the two offices were, ever had been, and ever should be the same," there was a marked distinction between them; the former being a mere appointment *ad interim*, the other one of more permanency." This work proves that before the passing of this statute the offices were not, and subsequently have not been identical; "but it is not easy to determine what was the exact shade of difference between them."

Elsewhere it is observed, "Notwithstanding this statute, it is quite clear that the keepers of the seal were not anciently considered to have the same authority as the chancellor of England, Sir Thomas Audeley, in 1532, being the first keeper that had such authority. From the passing of the statute, however, there can be no doubt that the *authority* of the keeper of the seal is the same as that of the chancellor, for there cannot now be a lord chancellor and a lord keeper at the same time. It might have been supposed that after this statute, the difference between the title of lord chancellor and lord keeper would no longer have been observed; yet there are two or three instances in which the lord keeper was afterwards specially appointed lord chancellor."

Another fact of some constitutional interest is manifest. "The sovereign has on several occasions demanded the seal of the chancellor, and kept it in his own possession for several days, allowing it to be used only in his presence, and even in the absence of its responsible keeper."

Matthew Paris relates, that in the year 1238, Henry the Third forcibly took the great seal from Ralph de Neville, his chancellor, and committed it to the custody of Geoffry the Templer, and John de Lexinton. The king repented of his indiscretion, and in vain attempted to induce the chancellor to resume the custody of the seal.

Queen Elizabeth did not appoint any chancellor until she had reigned upwards of twenty-one years.[1] The day after her accession to the throne she received the seal herself, which "she immediately gave to Sir Ambrose Cave to take

[1] Bacon was only Lord Keeper, and his not being Chancellor was undoubtedly the cause of the passing of the act 5 Eliz. above alluded to.

to her private chamber, there to remain until the queen should otherwise command."

In the interval between lord keeper Bacon's death (20 February, 1579), and the appointment of Sir Thomas Bromley as chancellor (26 April, 1579), the queen herself kept possession of the great seal, delivering it out, as required, to Lord Burghley and the Earl of Leicester, and receiving it back again. Each delivery and return is minutely recorded on the Close Roll. Again, for a period of four years after Chancellor Bromley's decease, Queen Elizabeth guarded the great seal herself with watchfulness. And after Sir Christopher Hatton's death, who was chancellor for a few months only, the queen never appointed another chancellor. It cannot be doubted that a jealousy of her own royal prerogatives, or a desire for the exercise of arbitrary powers, which the existence of a lord chancellor would curb, must have prompted Elizabeth to this remarkable and seemingly unconstitutional course. When the sovereign was virtually supreme, it mattered little whether the royal mandates were issued by himself or his secretary, or whether such an officer existed or not; but as the royal authority became gradually restricted within prescribed limits, the lord chancellor became an integral part of the constitutional order of proceeding. If Queen Elizabeth found it difficult to be her own chancellor, the progress of events would render it impossible for Queen Victoria.

The following curious history shows with what feelings of jealousy the custody of the great seal was regarded in Charles the First's reign. It almost amounts to denial of the right of the sovereign to hold his own signet.

"Lord Keeper Littleton sent the seal to the king at York by Mr. Elliott on the 21st May, 1642, and arrived there himself on the 24th of the same month. In the Journals of the House of Lords this entry occurs: 'May 23. Upon information given to this House, that whereas the lord keeper having leave of this House, to be a few days absent for his health, his lordship is now gone to York, and hath parted with the great seal on Saturday last (21st), hereupon it is ordered that the gentleman usher attending this House, or his deputies, shall forthwith take into custody the Right Hon. Edward Lord Littleton, and bring him before the lords in parliament, and together with the great seal of England, if it be

in his custody.' (Lords' Journ. vol. v. p. 80, and Commons' Journ. vol. ii. p. 587.) On the 30th of May the lord keeper sent his petition to the House of Lords, in which he states his willingness to submit to their lordships' order of the 23d instant, so far as it is possible for him to perform; he being in so weak a condition of body, that he is not able to travel at present towards Westminster without danger of his life. He further informed their lordships, that on Saturday last (21st May), about two o'clock in the afternoon, was the first time that he had heard of his going to York, when he received his majesty's command, under his sign manual and privy signet, to take his journey immediately, without reply or delay, towards York, and to keep the same secret. He begs their lordships' pardon for not asking leave, which he could not possibly do, the House not sitting till Monday. He further taketh the boldness to inform their lordships, that the king's majesty hath expressly commanded him, upon his allegiance, not to depart from him; and, lastly, he beseecheth their lordships to continue him in their good opinion until he shall advise or consent to any thing against the public good of the commonwealth. (Lords' Journ. vol. v. pp. 91, 93.) Upon this the House resolved to have a conference with the House of Commons, 'to consider of a declaration to declare in what case the great seal of England is, and how the common justice is stopped.' The House of Commons having consented to a conference, a committee was appointed to consider how the obstruction of justice by the taking and detaining the great seal out of the custody of the lord keeper and the like inconveniences may be remedied and prevented for the future.' (Comm. Journ. vol. iii. pp. 754, 755.) After various conferences with the House of Lords on the subject of the great seal, the House of Commons on the 11th May, 1643, among other things, resolved, 'that by reason the great seal hath not attended parliament, according as it ought by the laws of the land, the Commonwealth hath suffered many grievous mischiefs, tending to the destruction of the king, parliament and kingdom, and that it is the duty of both Houses of Parliament to provide a speedy remedy for these mischiefs.' (Comm. Journ. vol. iii. p. 80.) After various discussions and resolutions in both Houses relative to the great seal, it was resolved that a new great seal should be made, and 100*l.* paid for the same to Mr. Thomas Symonds.[1] On the 28th September, 1643, the

[1] The engraving of Henry the Third's great seal cost 40*s.*, or about 30*l.* of our money. This Thomas Symonds was the engraver of the celebrated crown piece of Charles the Second, of which there are not more than four in existence, and which bring upwards of 170*l.* at sales.

new great seal was brought into the House of Commons [!] and delivered into the custody of the Speaker, not to be used until the House take further order."

The whole history of the great seal during the Commonwealth abounds with curious and valuable facts.

We now proceed to speak seriatim of the several classes of Chancery officers, beginning with the highest, which has ranked as such from the earliest periods, and out of which the whole establishment may be considered to have sprung, as the wants of society called for it.[1]

"The CHANCELLOR," states Mr. Hardy, "was formerly, as he is at present, constituted by the sovereign delivering the great seal of England into his custody." He continues in office until he resigns that seal either to the king *personally*, or to some one formally deputed by him to receive it.

"It ought, however, to be remarked, that there are cases in which the chancellor may deliver up the great seal of England to the sovereign without vacating his office: such, for example, as where the king takes the great seal with him out of the realm, and leaves another seal to be used in England by the chancellor, (e. g. Hen. III. took the great seal with him to France more than once, and left the exchequer and

[1] "It has its name of Chancery, *cancellaria*, from the judge who presides here, the lord chancellor; or *cancellarius*; who, Sir Edward Coke tells us, is so termed *a cancellando*, from cancelling the king's letters patent when granted contrary to law, which is the highest point of his jurisdiction. But the office and name of chancellor (however derived) was certainly known to the courts of the Roman emperors; where it originally seems to have signified a chief scribe or secretary, who was afterwards invested with several judicial powers, and a general superintendency over the rest of the officers of the prince. From the Roman empire it passed to the Roman church, ever emulous of imperial state; and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of them he seems to have had the supervision of all charters, letters, and such other public instruments of the crown, as were authenticated in the most solemn manner: and therefore when seals came in use, he had always the custody of the king's great seal. So that the office of chancellor or lord keeper (whose authority by statute 5 Eliz. c. 18, is declared to be exactly the same), is with us at this day created by the mere delivery of the king's great seal into his custody, whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedency to every temporal lord."—(*Blackstone*, book iii. c. 4.)

other seals to be used in England by the chancellor); or where the great seal is sealed up by the king's command, and deposited, during his absence from England, in some place of safety, and another seal given to the chancellor for the dispatch of business, (e. g. the great seal was left in the queen's custody, sealed up with the privy seal, A. D. 1253); or where the chancellor is sent on a mission out of the realm, or to a distant part of the kingdom, and delivers the great seal to the king personally to be placed in other custody, or to some individual nominated verbally or in writing by his majesty." Thus the chancellor going abroad (A. D. 1274), delivered the seal into the king's wardrobe to be kept under the seal of John de Kirkeby, who was afterwards desired by the king to leave the same in the charge of Thomas de Bek. When John de Sandale, chancellor, went on a pilgrimage to the shrine of St. Thomas of Canterbury (A. D. 1318), the seal was left in the hands of a keeper.

John Salmon, Bishop of Norwich (A. D. 1321), being ill and prevented from discharging the duties of his office, the king sent the great seal by Richard Camel to the queen; and her majesty was directed to deliver it daily to the master of the rolls, who was to return it to her after each day's sealing.

Robert de Baldok having obtained the king's permission to go home for recreation, delivered the seal to the king in Windsor Forest, where his majesty was then hunting (A. D. 1324).

The following historical memoranda will complete the notice of the lord chancellor's office.

Walter de Gray purchased the chancellorship for the sum of 5000 marks (A. D. 1206).

Henry the Third had no great seal until the third year of his reign.

Edward the Third brought a new seal with him from France, which was substituted for the old. Impressions of the new seal were sent into each county for the purpose of making it generally known.

The Lord Keeper, previously to the statute in question (5 Elizabeth), performed few of the functions of the chancellor, unless he were thereto expressly delegated. "He frequently had the custody of the great seal committed to him by the

chancellor, without the power of using it; and although the seal was often placed in his hands either by the king himself, or by his written command, yet he had only the power to seal instruments of a particular class, and he was obliged to close it up every day, after using it, under his own seal and those of other persons expressly appointed for that purpose. Even after the statute to which reference has been made, instances can be adduced where persons, after holding the seals as lords keepers, have been constituted chancellors."

No actual *appointment* of a MASTER OF THE ROLLS has been discovered antecedently to the year 1295, but one Johannes de Langeton is styled "Custos Rotulorum Cancellariæ Domini Regis," in the 14 Edw. I. (A.D. 1286); and in the appointment of 1295, the injunction that the office was to be held as was accustomed in times past,—"Ita quod custodiam illam eo modo habeat, quo alii custodes eam habere consueverunt temporibus retroactis,"—proves that the office was known before that period. Mr. Hardy adds that "there is some reason for believing it to be coeval with the origin of enrolments. In the 'Dialogus Scaccarii,' written in the reign of King Henry the Second, it is stated that the chancellor has the custody of the rolls of the Chancery by a deputy; and as one of the ancient titles of the Master of the Rolls, is Keeper of the Rolls of the Chancery, it may be reasonably inferred that the office was in existence at least before the reign of Henry the Second. The Master of the Rolls usually had the custody of the great seal during the absence of the chancellor or when that office was vacant, and he was generally delegated quasi lord keeper to perform the various functions of the chancellor, a jurisdiction which no other lord keeper exercised."

The office of VICE-CHANCELLOR does not date further back than the year 1813, when it was created by an act passed in the 53 Geo. III., intituled "An Act to facilitate the Administration of Justice." Two additional vice-chancellors were added by the statute 5 Vict. c. 5, whereby "it is enacted that her Majesty shall have power to appoint by her letters patent two additional judges, assistant to the lord chancellor, to be respectively called vice-chancellor." But as early as A.D. 1218, Mr. Hardy mentions several original letters which

are extant, and which were addressed to Ralph de Neville as the king's vice-chancellor. They relate to the custody of the king's great seal. Other letters are addressed to John de Kirkeby, as the king's vice-chancellor, A.D. 1272.

Mr. Hardy is of opinion there can be no doubt that MASTERS in Chancery were established prior to the reign of Edward the First, yet none of their appointments are recorded before the year 1597; from that time to the present the series is quite perfect. The master of the rolls is the chief master in Chancery. Including that functionary and the accountant-general there are now thirteen masters. The statute 5 Vict. c. 5, increased the number to this point, which was anciently limited to twelve.

The office of ACCOUNTANT-GENERAL was created A.D. 1726, and it has always been filled by a master in Chancery.

"The list of the SIX CLERKS commences in the year 1545, and is brought down to the present year," when the office was abolished, and its duties transferred to new officers called the "clerk of the enrolments in chancery," the "clerk of records and writs," and the "taxing masters."

As early as the year A.D. 1388 the office of REGISTRAR was in existence, but the dates of the appointments of registrars cannot be carried higher than the year A.D. 1549.

According to Bladen's MS. History of the Six Clerks, the office of EXAMINER was created in the reign of Edward the Fourth. Mr. Hardy, however, is not able to begin his list before A.D. 1609. In like manner, the table of the CLERKS OF THE PETTY BAG cannot be carried up higher than A.D. 1598, "although the office is known to have been in existence several centuries earlier."

It has not been the practice to record the appointments of the secretaries of the lords chancellors and masters of the rolls, but the offices are ancient. "The chancellor's secretaries are carried up to the year 1778, when Lord Thurlow was in office; and those of the masters of the rolls to the year 1614, when Sir Julius Cæsar held that office."

We must not conclude without pointing out the very lucid arrangement of the list of names, whereby the synchronous order of the most important offices is shown at once, and the strict chronological sequence of each office made quite clear.

The use of this volume will be obvious to all inquirers into the history of the Court of Chancery, and it will be most helpful in general historical investigations, affording the means of identifying dates with great precision. The compilation of lists of names might seem a very simple matter and dry enough withal when done. In the present case the care and learning bestowed on the work invest it with an interest of its own. If it may be received as a token of the character of Mr. Hardy's promised history of Chancery, the profession will have to welcome that work as one of no ordinary merit and completeness.

H. C.

ART. III.—INTERMENT IN LARGE TOWNS.

Report from the Select Committee of the House of Commons upon the Effect of Interment of Bodies in Towns, together with the Minutes of Evidence. Ordered by the House of Commons to be printed, 14 June, 1842.

In the last session of Parliament a Select Committee of the House of Commons was appointed, upon the motion of Mr. Mackinnon, to inquire into the interment of bodies in large towns. At the time of the appointment of this Committee a general impression prevailed that the parish burial-grounds of the metropolis were insufficient for their purpose; but the subject had not attracted much of the attention of Parliament or the public; the complaints against the existing system were not loud or general; and the pressure for a change was not urgent. Since the appearance of the Report of the Committee, and the additional publicity which the more striking portions of the evidence have received through the newspapers, a conviction of the necessity of a complete and speedy alteration seems to be nearly universal. It may thus be confidently expected that the subject will occupy the attention of Parliament at no distant period; and the recommendation of the Committee, that a bill carrying their resolutions into effect should be introduced by the government, will doubtless attract the attention of ministers. We need not, therefore, apologize to our readers for laying before them such a view of the

Report and Evidence of the Committee, as is suitable to the objects of this journal; though in so doing, we may, from the nature of the subject, be compelled occasionally to quit the province of the legal, and to trespass upon the territory of the medical and theological faculties.

The subject falls generally under two heads. First, the *evils* arising from the present mode of interment in large towns. Secondly, the *remedies* for these evils which are proposed by the Committee or the witnesses whom they examined.

Upon the first of these two divisions we intend to say only so much as may render the general bearings of the question intelligible to the reader, by explaining the character of the inconveniences to which the remedies are to be applied. We propose to direct our principal attention to the *remedies;* the discussion of which involves many important legal and legislative considerations. Moreover, as the Committee were principally occupied with discovering the nature and extent of the evils produced by the present system, the remedies for those evils, although often adverted to in their examinations and stated summarily in their Report, have not been scrutinized with the closeness which the importance of the subject demands.

The inconveniences of the existing system of interment in London and other large towns are owing to the smallness of the burial grounds, combined with their situation within the precincts of the town, and the populousness of the parishes to which they belong. Each parish has a burial-ground, commonly attached to the church; and therefore the burial-grounds of town parishes must in general be in the midst of streets and houses. The following appear to be the principal inconveniences brought to light by the Committee, which relate mainly to London and its vicinity.

1. The want of space in the burial-grounds, and the large number of bodies which are brought for interment in them, often create a necessity of breaking up the coffins and mangling the recently buried corpses, in order to make room for new graves.[1] We do not think it necessary to repeat any of the

[1] The allegations of the defendants in Gilbert v. Buzzard (2 Haggard, 339), show impliedly the necessity in question, by pointing out the inconveniences which would result in a London churchyard from the use of iron coffins. "That the

nauseous details with which the evidence abounds; but if any of our readers should desire to be further informed on the matter, he will find that the facts stated by the gravediggers who were examined by the Committee, far exceed in loathsomeness anything which could be told of the dissecting room or the shambles. The objection to this practice of anticipating the natural decomposition of dead bodies, which arises upon religious grounds, is thus stated by the Bishop of London, in his evidence. "It has always (his lordship says) been characteristic of Christians to pay the utmost respect to the bodies of the deceased, as having been the tenement of the soul which is, we believe, to be reunited to it at the judgment day; and although after a time the tenement may be dispersed, and all must come to the same dust, yet there is a natural feeling of preserving that tenement as long as it can be" (Q. 2992).[1] Moreover, it is desirable, on account of the feelings of the survivors, that the bodies of their near kindred should not be treated with indignity. Even John Eyles, the gravedigger of St. Clement Danes' Churchyard, in Portugal Street, who seems from his evidence not to have been overnice for his vocation, interfered when he saw that the other gravediggers were about to mutilate the newly buried body of his own father. He is thus examined by the Committee:—

"Is your father interred there [i. e. in St. Clement Danes' burial-ground]?—Yes, he is; I did not want him to be buried there.

"Did any thing occur to his remains?—I saw them chopping the head of his coffin away: I should not have known it if I had not seen the head with the teeth; I knew him by his teeth; one tooth was knocked out, and the other was splintered: I knew it

parish [of St. Andrew's, Holborn] is very large and populous, containing an increasing population of 30,000 persons; that the annual burials are above 800, and are increasing; that they have three burial-grounds, besides the churchyard, all nearly filled with corpses. That they would soon be rendered useless by the introduction of iron coffins."

[1] In the dialogue of Minucius Felix, the heathen interlocutor reproaches the Christians, with condemning the burning of dead bodies, lest it should hinder their resurrection: to which the Christian answers as follows. "Corpus omne, sive arescit in pulverem, sive in humorem solvitur, vel in cinerem comprimitur, vel in nidorem tenuatur, subducitur nobis: sed Deo elementorum custodia reservatur. *Nec, ut creditis, ullum damnum sepulturæ timemus, sed veterem et meliorem consuetudinem humandi frequentamus.*"—C. 87.

was my father's head, and I told them to stop, and they laughed; and I would not let them go any further, and they had to cover it over. It is time that something was done to stop it."—(Q. 1187-8.)

2. The practice of burying in over-filled churchyards makes the office of gravedigger a loathsome and unhealthy employment, degrading to the persons who perform it, and inevitably driving them to habits of drunkenness. Mr. William Burn, a master carman, says in his evidence—

"I do all sorts of work, sometimes night-emptying, and *that is beautiful in comparison to this.*"—(Q. 297.)

John Eyles is asked, "if the smell of the graves is more offensive than that of a common cesspool?" He answers:

"I emptied a cesspool, and the smell of it was rosewater compared with the smell of these graves."—(Q. 1183.)

The unwholesomeness of the occupation is deposed to by all the witnesses examined; and with respect to the moral habits produced by the employment, the following evidence will suffice.

"Mr. Helsdon, formerly Assistant Dissenting Minister in a burial-ground.

"What is the general character of the gravediggers, and persons employed in that way?—I am sorry to say, that the situation of life they are called to fill, and the nature of their avocation, is such, that they are driven from extreme necessity to an almost unusual use of ardent spirits, sometimes to allay that which they conceive to be fearful in the effluvia, and to take off the effect from the system; and at other times, being a vitiated class of characters, I am sorry to say, from what I have seen from five or six years being connected with the undertakers, I have no good opinion I can give of them; they are initiated into a habit of drinking; but the gravediggers, particularly, I have observed to be a low, depraved, drunken class of men. I have seen the men that used to dig the graves of which I am speaking, on a Sunday afternoon, obliged to be turned out of the ground and sent away by the conductor of the ground, in a state of inebriation that was disgraceful to any man."—(Q. 23.)

If it is a service to humanity to supersede the necessity of a filthy, slavish, or unhealthy occupation, so it must be confessed that the unnecessary creation of an employment such as that of a London gravedigger is an offence against the welfare of society.

3. The poisonous exhalations from the mass of corruption

which is scarcely covered by a thin layer of earth in many of the London churchyards, are not merely detrimental to the gravediggers, but are also carried into the air, and reach, at all events, the inhabitants of the neighbouring houses. We have no intention of dwelling upon the medical question as to the extent of the unhealthy influences engendered by this cause; though we are inclined to agree with the Bishop of London, that there has been considerable exaggeration on the subject (Q. 2948); but we are tempted to cite a remarkable case mentioned in the evidence of Mr. Atkinson, a surgeon, inasmuch as it not only proves the deadly effects of the effluvia arising from dead bodies, but also shows incontestably that typhus fever, which has been *generated* by atmospheric causes, can be *propagated* by contagion or infection.

"I was more particularly struck with the facts of the case of William Green, a gravedigger at St. Margaret's, close by the Houses of Parliament. That man, during the early part of May, 1840, was engaged in preparing a grave for a person; he had been engaged in the occupation many years; but when he was engaged in thus digging this grave, he had penetrated, by means of his pickaxe, a coffin which was close adjoining; he was immediately seized with faintness and lowness: he was observed to fall, and was then removed, for he had shown very little signs of life. He was taken to a public-house, where he had brandy administered to him, and then removed home, when a medical man attended him, who gave him the ordinary stimuli, but with no effect. He continued to grow worse, and the medical man, finding about that period, the third or fourth day after the attack, that he himself was getting very much indisposed, ordered the man to be taken to the Westminster Hospital, *where he died two days after his admission.* I was called in to attend the medical man; he had symptoms very peculiar, not symptoms that any person in ordinary life would be affected with under a pure atmosphere; he appeared to be affected in a way that I would say nothing could counteract, but that death must inevitably take place, and the effect was as potent, I am sure, as if some deadly poison had been given to him: he continued, although medicines were administered to him at different periods, to grow worse, *and died about the fifth or sixth day after the attack.* The symptoms, of course, were in some measure dissimilar to those of ordinary typhus, acquired where it is constitutional. They were peculiar, because the attack seemed to be entirely an annihilation of the nervous

system. The circulating system went on irregularly and uncontrollably, till death removed the patient. A servant who had attended upon him very closely was also attacked two days prior to his death. She was attacked in a similar way; the pulse precisely in the same condition as that of her master, *and she died three or four days after her master.* These cases appeared to me to be marked by such symptoms as I considered were not to be accounted for in any of the different diseases with which we are at present acquainted."—(Q. 2251.)

The symptoms of these cases of peculiarly malignant typhus were nearly as rapid and decisive as if it had been the plague. There can be no doubt that it was generated in the grave-digger by the effluvia from the coffin into which he struck his pickaxe; yet it is equally certain that this disease so generated was communicated from him to his medical attendant, and from the latter again to his maidservant, both of whom likewise died. Nevertheless, it seems to be often assumed by medical writers, that epidemic and contagious diseases form two opposite and distinct classes; and that if the plague, for example, arises from filth or want of ventilation, it cannot be communicated by contact; and, consequently, that all quarantine restrictions are superfluous: conclusions which the premises do not justify.

4. Another objection to the maintenance of churchyards in the midst of the most frequented parts of London is, that pathways lead through them, and they thus become crowded thoroughfares. Mr. Anderton, a solicitor, and a member of the common council, is thus examined:—

"Are any of the churchyards in London or Westminster thoroughfares?—St. Margaret's is.

"Besides St. Margaret's?—Yes, several; St. Clement Danes; I consider we are there burying within our town streets; I consider it very little better; I consider St. Paul's churchyard also burying in our town streets. I consider that all the churchyards within the city of London are in the same situation. They are most of them very small; they are all of them in very crowded neighbourhoods, and in the very heart of the city of London, and in the streets. It is very true they are separated from the main streets by iron railings, but that is all that can be said of them."—(Q. 2232-3.)

Mr. Milman, the Rector of St. Margaret's, in the course of his very interesting evidence, likewise confirms this view.

"In reference to the churchyard of St. Margaret's, is that full or not?—It is very full.

"Can you with convenience inter there?—My own opinion is, that interment ought to be discontinued there for several reasons; not because I have ever heard of any noxious effect upon the health of the neighbourhood, but on account of its public situation; it is a thoroughfare, and in point of fact it has been a cemetery so long, and it is so crowded, that interment cannot take place without interfering with previous interments."—(Q. 2744-5.)

We have now briefly stated what appear to be the principal evils of the present system of interment in London. We pass to the consideration of the measures proposed as remedies for those evils.

The following are the essential parts of the plan recommended by the committee. That in London, and other towns having a population greater than 50,000, interment be prohibited (with certain rare exceptions) within the limits of the town; that in such towns the parochial authorities be required to impose a rate for the formation of cemeteries at a certain distance therefrom; the authorities of two or more parishes being empowered to combine for the purpose; that a minimum of distance be fixed, on sanitary grounds, and a maximum, in order to protect the poorer classes against the inconvenience of attending remote funerals; and that the parochial authorities be responsible for the conduct of the burials in these cemeteries, and entitled to the same fees in respect of them as are received in the existing churchyards.

We proceed to examine this plan, to consider the objections to which it is liable, and to compare it with the suggestions of the witnesses.

The proposal to bury outside of towns is the obvious remedy for the evils arising from the practice of burying within them; and to whatever difficulties of another sort this plan may be subject, it is at least not open to the objection of being an innovation in the practice of the church, or inconsistent with ancient Christian usages; still less of being at variance with the general custom of civilized nations.

It is well known that the Jews used to bury outside the gates of their cities,[1] as is done by the Oriental nations at the

[1] See, for example, in Luke, vii. 12, the account of the raising of the widow's son

present day. The same was also the custom of the Greeks, and particularly of the Romans. Every reader of Thucydides will remember that the celebrated funeral oration of Pericles is delivered over the remains of the Athenian warriors who are buried in the public monument in one of the suburbs of the city.[1] So Cicero, in the epistle in which he describes the assassination of his friend M. Marcellus at Athens, mentions that he had been unable to obtain permission of the Athenians that the body should be buried within the city; they said that such a privilege was inadmissible on religious grounds, and that it had never been granted to any one.[2] In like manner the Romans strictly prohibited all burying within the city; one of the Twelve Tables was in these words—"Hominem mortuum in urbe ne sepelito neve urito."[3] The law of the Twelve Tables appears after a time to have been disregarded, whence a later senatus consultum was passed, re-enacting the prohibition; the emperors and vestal virgins (it is said) had their sepulchres within the city, because they were not bound by the laws.[4] The Roman law on this subject was so strict, that according to the decision of Ulpian, a rescript of Hadrian, imposing a penalty of forty aurei upon those who buried within a town, extended even to cases where the local law of the municipium permitted the practice.[5]

Both the Greeks and the Romans appear to have believed that the vicinity of a corpse polluted a sacred place, and consequently that a city, with its temples and altars, would be defiled and desecrated by funerals. Hence it was impious to bury any one in the holy island of Delos, or, indeed,

from the dead, as he was carried to burial outside the gate of Nain; also the account of the demoniacs in the country of the Gergesenes, who dwelt in the tombs close to the edge of the lake of Gennesareth; Matt. viii. 28; Mark, v. 2; Luke, viii. 28.

[1] II. 34.

[2] "Ab Atheniensibus locum sepulturæ intra urbem ut darent impetrare non potui, quod religione se impediri dicerent; neque tamen id antea cuiquam concesserant."—Epist. ad Div. iv. 12. See Middleton's Life of Cicero, U. C. 708. Compare what Plutarch, Arat. c. 53, says of Sicyon—*νόμου δ' ὄντος ἀρχαίου μηδένα θάπτεσθαι τειχῶν ἔντος, ἰσχυρᾶς τε τῷ νόμῳ δεισιδαιμονίας προσούσης.*

[3] Cicero de Leg. II. 23.

[4] Servius ad Æn. xi. 206.

[5] Dig. lib. xlvii. tit. 12, l. 3. It is known that the franchises of municipia were in general treated with great tenderness by the Roman law.

to allow any one to die within its precincts.[1] Hence, too, the Romans performed their funerals at night, lest the eyes of a magistrate or a priest should be polluted by the sight of a corpse.[2] The reason assigned by Paulus, the lawyer, in his Sententiæ, why a body should not be carried into a town is that a burial would pollute the sanctity of the place;[3] and Justinian's Code re-enacts a law of Diocletian, saying that it had long since been prohibited to bury within a city, "lest the sacred laws of municipia should be defiled.[4]" So, again, a law of Constantius, likewise adopted by Justinian, denounces the violators of sepulchres on two grounds; viz., that they spoil the dead by demolishing their tombs, and pollute the living by using the materials for new buildings.[5]

The early Christians, who were Roman subjects, necessarily conformed to the Roman law with regard to burying outside the city-walls. Their places of worship, during the times of toleration, were in the towns, and therefore no burials could take place in or near them; in times of persecution they met to pray in the catacombs or subterranean chambers which were used as burial places; and, therefore, it may rather be said of the primitive Christians that their burial places were their churches, than that their churches were their burial places.[6]

The strictness of these prohibitions was maintained, and even increased and extended, for a considerable time, by the Christian emperors. "When the emperors and laws were both become Christian (says Bingham), we find that the laws stood for many ages just as they were before, forbidding all burying in cities; and some new laws were made, particularly

[1] Thucyd. iii. 104.

[2] "Apud Romanos moris fuit ut noctu efferrentur ad funalia; unde etiam *funus* dictum est, quia in religiosa civitate cavebant, ne aut magistratibus occurrerent aut sacerdotibus, quorum oculos nolebant alieno funere violari."—Servius ad Virg, Æn. xi. 143.

[3] "Ne sacra civitatis funestentur."—I. 21, 3. The idea of pollution which was included in funestus and funesto originated rather in the general idea of *death* than of *burial*. Compare the words of the Sibyl in Virgil—

"Præterea jacet exanimum tibi corpus amici,
(Heu nescis), *totamque incestat funere classem*"—Æn, vi. 149-50.

[4] "Ne sanctum municipiorum jus polluatur."—Cod. lib. iii. tit. 44, l. 12.

[5] "Nam et sepultos spoliant destruendo et vivos *polluunt* fabricando."—Cod. lib. ix. tit. 19, l. 4. The Levites likewise were prohibited by the Mosaic law from attending at funerals.

[6] See Bingham's Christian Antiquities, b. 23, ch. i. ss. 1, 2.

prohibiting and restraining men from burying in churches. For when some persons in Constantinople began to make an invasion upon the laws, under pretence that there was no express prohibition of burying in churches made in them, Theodosius, by a new law, equally forbad both burying in cities and burying in churches; and this, whether it was only the ashes or relics of any bodies kept above ground in urns, or whole bodies laid in coffins: they were all to be carried and reposited within the city for the same reasons that the old laws had assigned, viz. that they might be examples and memorials of mortality, and the conditions of human nature to all passengers; and also that they might not defile the habitations of the living, but leave it pure and clean to them."[1] Justinian appears to have dropt the prohibition against burying in cities; but he retained so much of the old law of Theodosius as prohibited the burying in churches; saying, that it is not permitted to inter corpses in the holy places of the apostles and martyrs.[2]

The ancient Romans, as we have already seen, thought that a corpse contaminated a sacred place; and this idea was retained by the early Christains. The law of the orthodox Theodosius requires that bodies should be buried without the city, in order to exhibit a memorial of mortality, and *not to defile the habitations of the living.*[3] Accordingly, the connexion between the place of worship and the place of interment was only established by slow degrees. First, churches were built over the remains of martyrs in the country, or these sacred relics were transported to churches in the towns. Next, kings and emperors were allowed to be buried in the *atrium* or porch, and other buildings attached to the church. In the sixth century the people generally seem to have been admitted to the privilege of being buried in the churchyard, though not within the church. The council of Tribur, in the time of Charlemagne, to prevent the abuse of burying within churches, decreed that no *layman* should thenceforth be buried within a church; and that if in any church the graves

[1] Cod. Theodos. lib. 9, tit. 17, l. 6. Other stringent provisions, and a severe sanction, are added. The date of the law is 381 B. C.

[2] Cod. l. 1, tit. 2, l. 2.

[3] "Ut relinquant incolarum domicilio sanctitatem."

were so numerous that they could not be concealed by a pavement, the place was to be converted into a cemetery, and the altar to be removed elsewhere, and erected in a place "where sacrifice could be religiously offered to God;"[1] which last words evidently allude to the defilement of sacred places by dead bodies. At this time therefore, in the west, the practice of burying in the churchyard, both within and without cities, had become general; although a decree of the council of Braga in Spain, A. D. 563, says, that the cities of Gaul then retained their privilege of prohibiting all burials within the circuit of their walls. The emperor Leo expressly permitted burying within the city in the east about the year 900.[2]

"Thus the thing went on from one degree to another (says Bingham, whom we have followed in the preceding account of the laws and practice of the primitive church), taking various steps and motions, partly by permission and relaxation of the laws, and partly by transgression of the laws, and connivance in those who had the execution of them. And the matter at last was left, in a great measure, to the discretion of bishops and presbyters to determine who should or should not be buried in churches, according to the merit and desert of the persons who desired it." "I have been (he adds) the more curious in deducing the history of this matter from first to last, because the innovation has been thought a grievance by some very learned and judicious men, *and what they could have wished to have been rectified at or since the Reformation.* 'This custom,' says the learned Rivet, 'which covetousness and superstition first brought in, I wish it were abolished, with other relics of superstition among us; and that the ancient custom was revived to have public burying places in the free and open fields without the gates of cities. This would be more convenient for civil uses also; because in close places the air cannot but be affected with the nauseous smell of dead bodies; there is no good done by it to the

[1] "Ablato inde altari et constituto ubi religiose sacrificium Deo valeat offerri." Concil. Tribur. c. 17. See Bingham, ibid. s. 7.

[2] "Quicunque sive extra muros sive intra civitatem sepelire mortuos volet, perficiendæ voluntatis facultatem habeto." Leon. Nov. 53. This constitution recites that the ancient law had gone into disuse.

dead, and the living are in manifest danger by it, especially in the time of contagious distempers, when infected bodies are promiscuously buried in churches wherein men daily meet and assemble together; a thing,' says he, 'which not without reason has appeared horrible to me and many others.' The like complaint is made by some among the Romanists, particularly by Durantus, who was an eminent lawyer, and president of the parliament of Toulouse. He commends the piety of the ancients for not allowing the dead to be buried in the church; and Charles the Great for reviving and restoring the primitive institution when it had been in some measure neglected; and withal speaks it with great regret, that whereas heretofore emperors were buried only in the church porch, now the custom is to let the meanest of the people commonly be buried in the church itself against the laws and institutions of the ancient Christians."[1]

The custom of burying in and about the church, founded on the superstitious opinion that it was beneficial to the souls of the dead,[2] continued to be universal in western Europe from the middle ages down to a late period. During the last half century the practice of withdrawing interments from the separate churchyards in cities and collecting them in large cemeteries outside the limits of the town, appears to have become prevalent in France, Germany, and even Italy. These cemeteries in France and Germany are under the management of the civil power.[3] In England the practice of the middle ages has been generally maintained even in London and all the other large towns down to the present day.

It being assumed that the retention of the existing burial

[1] Ch. 1, s. 9.

[2] See Bingham, ibid. Dr. Burn, tit. "Burial," 1 Eccl. Law, 257, remarks as follows: "The reason given by Gregory the Great why it was more profitable to be buried within the precincts of the Church than at a distance was, because their neighbours, as often as they came to those sacred places, remembering those whose sepulchres they behold, do put forth prayers for them unto God. Which reason was afterwards transferred into the body of the canon law. And this superstition of praying for the dead seems to have been the true original of churchyards, as encompassing or adjoining to the Church: which being laid out and enclosed for the common burial places of the respective parishioners, every parishioner hath and always had a right to be buried in them."

[3] Walter, Kirchenrecht, p. 677.

grounds in London is undesirable on grounds of public convenience, the preceding account shows that the abolition of the practice of burying in and about the churches of the metropolis, and the establishment of cemeteries outside the town, would be in accordance with the practice of the Church during the first five centuries, which primitive and constant usage was only abandoned through the gradual introduction of ecclesiastical abuses.

Thus far, therefore, the question appears to be unincumbered with serious difficulties. Various obstacles to an efficient and economical reform of the present system, are, however, suggested by the questions of the Committee or the answers of the witnesses; which obstacles may be classed under the following heads:—1. The arrangements for the choice and purchase of sites for the new cemeteries, and the government of them when established; 2. The arrangements for the conveyance of funerals to the cemeteries; 3. The compensation of the parochial clergy and other persons having an interest in the fees now payable for burials in churches and churchyards.

I. One of the first knots to be solved is, whether the new cemeteries shall be *parochial*, that is to say, whether they shall, as at present, be considered as the proper burial places of all persons dying in certain parishes, or whether the right of sepulture shall be independent of parochial boundaries. The Committee recommend (as we have already stated), that the new cemeteries shall be parochial, shall be purchased by a parish rate, and be managed by the parish authorities; a power being given to several parishes to combine for the purpose.

Upon the latter subject we will cite the suggestions of Mr. Anderton, (whose evidence we have already referred to in connexion with another subject), although he appears to make some confusion with respect to pauper funerals.

"*Chairman.*] With regard to any legislative enactments that might be framed, as you are a man of considerable observation and in the legal profession, perhaps you will state to the Committee what, in your opinion, would be proper legislative enactments?—I should think that the first thing to be done would be to ascertain what has been the emolument of the clergy of the different parishes, taking

the aggregate for the last five or seven years, arising from interments, and I think then, that that ought to be made up to them by a rate on the parish, so as not at all to lessen their incomes. It might be a question whether for persons removed from the parish to cemeteries to be buried, something should not be paid to the parish, for registration in the parish, as well as at the cemetery. I think also that, adopting the plan of the Poor Law Unions, parishes might be consolidated in a similar way for the purpose of forming a general burying ground.

"Adopting the plan of the parish unions?—Yes; so that each parish would have to contribute in the same proportion, in the same way as they contribute there.

"Having a good deal considered the subject, can you state to the Committee what amount of rate you think would suffice to answer that expenditure?—That would depend a good deal on the nature of the parish; some parishes would be more and some less, in the same way as it is with regard to the contribution to the poor law.

"Mr. *Kemble.*] If I understand you, your recommendation would be that the parishes should be formed into unions for the purpose of having a union cemetery?—Just so.

"Of course the rate must mainly depend on the price at which the land is purchased for the purpose of a cemetery, and London being so thickly populated as it is, you must go some distance?—Yes; burying-grounds of that description would be more applicable to the poor than the rich, for I think the rich now would provide for themselves in the public cemeteries which have been established. The great difficulty is that of burying the poor, and the expense of burying them.

"Mr. *E. Denison.*] Can you suggest any means by which that can be got over?—That can only be done, I think, in the way I have suggested, namely, by classifying the parishes on the principle of the Poor Law Unions; because if you take the city of London, for instance, some of the parishes are very small, and perhaps they do not bury more than two or three paupers in a year; I would class them with other parishes.

"*Chairman.*] Would you make this union of parishes exactly the same as the pauper unions, or would you leave no discretion to the authorities in each parish to be out of the union, or would you compel them to belong to the union?—I do not know that I am prepared to answer that."—Q. 2239—45.

The following is Mr. Milman's evidence on this point:—

"Do you consider, in the event of any legislative enactment taking place, it would be a desirable thing to have unions of parishes for

the purpose of interment, as you have Unions now for the purpose of relieving the poor?—I should conceive, in the smaller parishes, particularly in the city, that would be the case; but as far as St Margaret's or St. John's are concerned, which have above 50,000 inhabitants, either together or singly, if they retain their present union, which they do for all parochial purposes, they would be quite large enough for any ordinary cemetery."—Q. 2733.

The opinion of the Bishop of London is contained in the following answers:—

"Would your Lordship think that the incumbent of the parish with two churchwardens and three members of the vestry, would be a proper sort of local authority?—I think the incumbent of the parish should be one party concerned, but I would not leave it in the breast of the incumbent to prevent a great improvement of that sort if he should think fit.

"But combined with the churchwardens?—I mean I would not leave it with the incumbent to prevent it; but in case of his refusal there should be an appeal, I should say to the bishop, to determine whether it was a case in which the remedy ought to be prevented, even though the incumbent might not think it fit.

"You have mentioned that monumental tablets, that the fees arising from them, would be lost to the incumbent?—Yes.

"Would it not be the same thing, assuming that burial-grounds were removed instead of being in the vicinity of a church, or near a church, to some distance; would not private vaults be made use of in burial-grounds over which monumental tablets would be erected, just in the same manner as in churchyards?—*If cemeteries were parochial cemeteries*, the rights of clergymen may be preserved; if that were the case, I think there should be a new arrangement altogether with respect to monumental fees, which in my opinion ought not to go into the pocket of the existing incumbent, but should form a fund for the benefit of the living. With respect to what you have said about a parochial union, it is a plan which I very strongly urged upon the clergy of London ten years ago, and I desired them to consult their churchwardens about it, as being the best remedy that could be applied to the existing evil, and the most likely to secure them from loss, but the difficulty was too great at that time to be got over."—Q. 2963—6.

The general religious arguments in favour of a parochial system of cemeteries, appear to be well summed up in the following answers of the Rev. Mr. Champneys, the incumbent of Whitechapel parish:—

"In the event of a legislative enactment being made, and it being necessary to have a certain authority in parishes or unions, in whom would you vest that parochial authority, for the purpose of purchasing land and superintending all the necessary arrangements which must occur from the change in the system?—My impression would be, that it would not be desirable to vest it in the guardians of the union, but rather in the authorities of the parish; by that I mean the churchwardens chiefly, and the lay members of the parish, rather than the clergyman; and my reason for saying that it would be better not to vest it in the guardians of the unions would be, that I feel that, though it is a prejudice for persons to wish to be buried near the church, or near their own families, if we believe the great doctrine of our faith,—the resurrection of the body, yet at the same time I feel that it is desirable that that feeling should be as much as possible cherished: and I conceive that that feeling of attachment of parishioners to their clergyman, and of the clergyman to those parishioners to whose relatives he has ministered on their death-bed, would be more likely to be maintained in this dissolution of the present system of interment by the individual connexion, as far as possible, subsisting still even after death between the minister and his people; and I conceive that the vesting it in a board of guardians would be at once creating a revolution in that feeling, and taking away one very powerful hold and influence which the minister now has over the families of the departed, to whom he has ministered in their trouble, and to whom he ministers still.

"You would allow part of the authority to exist in the clergyman?—The legislative part of the authority, that is to say, the conduct of the funerals, the arrangement of the cemeteries, I would rather put on the shoulders of the churchwardens and the lay authorities of the parish; I would reserve to the clergyman the right of burial, the spiritual part, if I may so call it, of the interment of the dead, and that part of the connexion which now subsists between the parties."—Q. 2879—80.

The practice of burying in and near churches arose (as we have already seen) from a mistaken belief in the benefit arising to the soul of the deceased person from the holiness of the place. As soon as churches were connected with parishes (which in England did not take place till the end of the seventh century), the burial-grounds attached to them naturally became parochial likewise. Writers on ecclesiastical law lay it down that the right of Christian sepulture is founded on *Church communion;* and consequently, that those who die

out of communion with the Church, such as infidels, heretics, schismatics, persons under interdict or excommunication, or persons who have been indifferent to their religious duties, are not entitled to Christian burial.[1] From this reasoning, which considered the dead man as a continuing member of the Church, it followed easily that a parishioner was to be buried in his parish churchyard, and that the departed parishioners should continue to form, as it were, a posthumous congregation around their own church. But this view can scarcely be reconciled with the doctrine that the burial rites are for the sake of the survivors, not of the buried. Even Augustine has said that the ceremonies of a funeral are rather for the consolation of the living than for the benefit of the dead.[2] Accordingly, Mr. Champneys expresses an opinion in the passage just cited, that parochial funerals are desirable on account of the connexion which they maintain between the *surviving relations* and the parish clergyman. If, however, it is admitted that the cemeteries are to be moved to a distance from the town, it is difficult to perceive how the clergyman of a town parish can maintain the connexion which Mr. Champneys indicates. We shall return to this point lower down. It may be added, as an additional argument in favour of maintaining the connexion between cemeteries and parochial divisions, that it might facilitate the arrangement of a compensation for the parochial clergy: a question which, as we shall see presently, is a material element in the proposed reform.

It is not our intention to enumerate all the difficulties which the recommendations of the Committee appear to suggest; but we will observe, that if a plan of parish unions is adopted, the following questions will require to be answered. If, on the one hand, parishes are merely *permitted* to combine, does experience warrant us in expecting that a sufficiently large number of the small parishes will unite voluntarily? The parishes in the city of London are 98 in number, contain-

[1] Walter's Kirchenrecht, p. 676 (ed. 9.) See also 1 Burn's Eccl. Law, 265, title "Burial."

[2] "Proinde omnia ista, id est, curatio funeris, conditio sepulturæ, pompa exsequiarum, magis sunt vivorum solatia quam subsidia mortuorum."—De Civ. Dei, T. 12. See the rest of the passage in Bingham, b. 23, c. 3, § 23.

ing, according to the census of 1831, a total population of only 57,100 souls, and separately, an average population of only 582 souls. If, on the other hand, the parishes are to be united, who is to exercise the power of uniting them? It is to be observed that if, in consequence of the unnecessary multiplication of large cemeteries, a heavy expense is imposed upon the ratepayers of the several parishes, much discontent will be created. The evils now, though they may be felt severely by the persons who have houses overlooking the crowded churchyards, are unfelt by the great bulk of the inhabitants. Upon this point we may again cite Mr. Champneys.

"*Lord Mahon.*] From the feeling which you say prevails in the parish against interment in towns, do you imagine that a moderate rate for the construction and purchase of a new cemetery would be cheerfully borne?—In answer to that question, I would say that people very often make complaints when the complaints do not touch them; but when they come to be touched in their pockets, they object to it; and I apprehend that would be the case with regard to those; that many of those who are loudest in the complaint, would be the slowest to put their hands in their pockets.

"You think that though they now loudly complain of the grievance, the moment they heard of these provisions they would be less ready to apply themselves to the remedy?—I apprehend that there are many of that description; I should say that the feeling, though it is a general one, has arisen rather from the strong feelings of the few than from the question having been universally considered, and it being universally felt in the parish."—Q. 2873, 2874.

Another practicable plan is for the new cemeteries to be independent of parochial boundaries, and to be governed by authorities which have nothing of a parochial character.

The Bishop of London, in an answer already quoted, speaks doubtfully of the policy of retaining parochial divisions: in the following replies he explains his meaning on this point more fully.

"Now with regard to a general legislative act taking place, I think, from the tenor of your lordship's observations, it would appear that if such an act took place, the execution of that act must be left to different local authorities?—I really am not quite prepared to give a positive opinion to such a question. There are so many interests involved, that I see the difficulty of passing an act

which shall not leave it to the discretion of the local authorities to apply it or not, as they deem fit. At the same time I see great difficulty even in that; but upon the whole, I think some plan of the sort must be adopted. I must add my own conviction, that in the case of the metropolis, the most important of all the cases, it would be extremely desirable that government should take it into its own hands; that government should provide a cemetery, and make such regulations as may be necessary, as government does not want to be a gainer by the transaction; and the expense of purchasing lands for the cemetery, and preparing them for the purpose of interment, would in the course of a few years be repaid to the public, while at the same time the interests of the clergy would be protected.

"Would there not be some difficulty in carrying the measure into execution from this circumstance, that if the government interfered, they must either apply the public money for that purpose or they must apply the parochial funds; and if they apply the public money, some difficulty might arise with the chancellor of the exchequer, and if they had to raise it by a parish rate by their own fiat, probably a good deal of discontent would be raised?—I alluded not to their ordering rates to be raised, but to their providing cemeteries either with the monies now in the hands of the Commissioners of Woods and Forests, or by a grant of public money to be repaid after a time: because if it answers the purpose of a cemetery company to buy and prepare ground, it would answer the purpose of government to do it. The government have lately purchased a considerable tract of land, a part of which, if it had not been designed for other purposes, would have been admirably adapted for a cemetery. The land situate to the north-east of Bethnal-green, which is to be called Victoria Park, and which the government purchased with a large sum of money that happened to be in the hands of the Commissioners of Woods and Forests, *would make a cemetery for the whole of the metropolis for the next hundred years;* but I am glad to see it devoted to the benefit of the living rather than to the reception of the dead. *I do not, however, think the two incompatible; I think you might form a cemetery and lay it out in such a manner as at Frankfort and other places,* so as to make it a cheerful promenade. By cheerful, I mean an agreeable place.

"Does your lordship think that cemetery would be sufficient for the whole of London?—No; for that part of London.

"Then your lordship confines your attention to that district?—Yes; taking that end of the town, all the north and the east."—Q. 2972—2975.

It will be seen from the above remarks that the Bishop of London contemplates as possible the establishment of burial grounds in London, similar to those in the large continental towns, which shall be quite independent of parochial boundaries, and which shall be placed under the superintendence of the government. His lordship appears to be of opinion, that if burial grounds are to be parochial, the Church Building Commissioners would be a fitting authority for their control (Q. 3013). It is to be observed that by the 3 Geo. IV. c. 72, s. 26, the Church Building Commissioners are at present empowered, without the consent of vestry, to direct the churchwardens (or persons authorized to make rates under the Church Building Acts), to make and levy a rate for the purpose of procuring a burial ground, or of adding to any existing burial ground.

It is difficult to fix the maximum and minimum of distance from the limits of the town for the new cemeteries, and still more difficult to define those limits by general expressions suited to an act of parliament. The towns of the middle ages were surrounded with walls, and their limits were well defined; but London, in its wide sense, has no recognized boundaries. The following are the opinions of witnesses on this point: Dr. Knapp, Vicar of Willesden, but resident in London, thinks that cemeteries should be not less than four or five miles from the town (Q. 923). Mr. Atkinson, the surgeon, thinks that no burial-ground should be situated "within half a mile of the metropolis;" by which he explains that he means, "half a mile at least from any inhabited quarter;" and that they ought to be, as far as possible, to the N. E. of the town, on account of the prevalence of south-westerly winds (Q. 2287—9). Dr. Copland, being asked how far the cemeteries ought to be placed from any inhabited quarter, says that "three or four miles is quite near enough; there should be none nearer than two miles" (Q. 2673). The latter witness likewise thinks that the *depth* for burying bodies ought to be prescribed by law; and that they ought not to be interred higher than six or seven feet from the surface (Q. 2674, 2681). Mr. George Alfred Walker, a medical practitioner, who has written a book upon burials in towns, and has given much attention to the subject, thinks that graveyards should be as elevated as possible, and

not in a clayey soil (Q. 858); moreover, that the building of houses in their neighbourhood should be prohibited by law (Q. 865).

We may here remark that, according to the view of the Bishop of London, the consecration of a burial-ground ought to be indelible: "I am strongly of opinion (he says) that security ought to be given, that, except in very special circumstances where the legislature may think proper to interfere, cemeteries set apart for the purpose of Christian burials should be secured *in perpetuum* for that purpose" (Q. 2948). The consecration of cemeteries is not of high antiquity in the church: it appears not to be earlier than the sixth century.[1]

II. The removal of cemeteries to places without the town obviates the objections arising from their present situation, but creates a new set of difficulties connected with the necessity of conveying funerals to a distance. It is obvious that the distance of the burial-ground must, other things remaining the same, increase the expense of funerals: and that this increase of expense would be felt most acutely by the less wealthy classes. Dr. Bowring indeed thinks that the additional expense arising from this cause would not be great; and that many difficulties will be met by the circumstance that the poor would almost invariably be deposited in the more adjacent burial-grounds, while the more opulent would frequently be removed to a greater distance (Q. 1839-40, 1858). Most of the witnesses, however, admit the difficulty in question. Mr. G. A. Walker is of opinion that *all* funerals should be under the direction of the government, and that the parish authorities should have no concern with them (Q. 899). Dr. Knapp thinks that some assistance might be afforded out of the rates or out of parish property; and that a light carriage might be provided to take the body, as well as the mourners, at a comparatively small expense, especially if the arrangements were made under the direction of the public administration (Q. 924—927). Mr. D. R. Barker, parish clerk of St. Stephen's, Coleman Street, states that he has heard described a carriage invented by Mr. Shillibeer for conveying the corpse and mourners; it contains only one body, and after this has been buried, the part which was used for the coffin

[1] Bingham, b. 23, c. 2, s. 1.

is converted into a seat for the bearers and the persons attending the funeral (Q. 1993). Mr. Deacon, the town clerk of Southampton, who describes some fruitless attempts which have been made to establish a new cemetery outside the town, states that in this case the town council calculated that "the fees they should receive from the rich would enable them to convey the poorer classes at a very inconsiderable expense." —(Q. 2658.)

The most important evidence on this point is, however, that given by the Bishop of London and Mr. Milman.

"I would remark (says the Bishop of London), that a provision ought to be made (and this will be one of the difficulties of the case) for the funerals of the poor; as it is, they are much too expensive for poor people, and if they are obliged to carry the bodies of their friends to a distance in the country, in the present mode, it will become more so. There is, however, no expense so little thought of by the poor as the expense of a funeral. I have known repeated instances where they would deprive themselves of the necessaries of life for the sake of paying respect to the bodies of their departed friends; and I should be sorry that that feeling should be interfered with beyond a certain extent. I think by means of a cheap and decent kind of conveyance, of a hearse, that the expense of a funeral may be reduced, and if the poor do not object to avail themselves of it, that it may be done as cheap as their funerals are performed at present, if they are willing to dispense with what is called a 'walking funeral.'"—(Q. 2948.)

In a subsequent answer, the Bishop of London explains his notion of a funeral conveyance to be one which should convey both corpse and mourners.—(2994—2996.)

"The most important question, as appears to me (Mr. Milman says), affecting the poor, is the expense of interment. It would be very undesirable for the legislature, in my opinion, to adopt any measure that would increase that which in itself is, to a certain degree, a heavy expense upon the poor inhabitants of the metropolis. I cannot but think that by some well-regulated scheme, by a conveyance being provided under parochial regulations, or some regulation laid down generally for the metropolis, the bodies might be conveyed to a certain distance, say two or three miles, with very little more expense by horses and carriages, than upon men's shoulders, as they usually are at present, for a distance of two or three streets. It seems to me, that conveyed as living persons are

at so small an expense from one part of the town to another, the bodies of the dead and mourners might, provided there were some general system adopted by the parishes, be conveyed to that distance without any increased expense."—(Q. 2728.)

III. We come now to the question of the compensation to be made to the parochial clergy, and others having an interest in the fees taken for burials in churches and churchyards; with which is connected the question as to the authority to be exercised by the parochial clergy over the new cemeteries.

The Committee do not express clearly their meaning as to the mode by which the London clergy are to be compensated for the loss of their fees on burials; but we presume that the clergyman is intended to be included in the "parochial authorities," who, according to Resolution 10, are to be entitled to the same amount of fees for burials in the new cemeteries as they receive at present for burials in the parish churchyard.

The opinions of the clergy on this subject are doubtless faithfully represented in the following remark of the Bishop of London: "I am sure," he says, "that the clergy, generally speaking, would be willing to make some sacrifice for the sake of effecting so great an improvement as is contemplated; but you cannot expect men, the principal part of whose subsistence in some cases depends upon the fees arising from a practice that has hitherto not been complained of, willingly to give up the whole source of that income without some compensation."—(Q. 2948.) The London clergy, not receiving tithes, and having little or no glebe, depend to a great extent on burial fees and similar offerings for their incomes. The Bishop of London produces an account of the receipts of many of the London incumbents from this source; and in some cases they are very large. Thus, in 1840, the burial fees of the clergyman alone were, in St. Giles's parish, 635*l.*; in St. Marylebone, 516*l.*; St. George's, Hanover Square, 488*l.*; Paddington, 425*l.*; Kensington, 254*l.*; St. James's, 246*l.*; St. Andrew's, Holborn, 223*l.* These fees are independent of those paid to the churchwardens, clerk, or sexton. Mr. Milman therefore appears to be nearly justified in saying that if the burial fees ceased, the emoluments of the clergy of London would be half swept away.—(Q. 2783.) *Vault-fees*

form no inconsiderable portion of the income of many London clergyman, (Milman, Q. 27292), and the Committee, supported by the authority of the Bishop of London, recommend that burials in churches should be prohibited, with the exception of family vaults.

The mode of arranging the compensation to the clergy is closely connected with the question of making the new cemeteries parochial, which was considered above. Two plans of compensation are proposed. One plan is, to relieve the parochial clergy of all duty in connexion with burials, and to deprive them of all right to burial fees, but to give them a fixed compensation, founded upon the average of their receipts from burial fees for some years past. This compensation would either come from the consolidated fund, or, according to Dr. Knapp's proposal (Q.936—8), from a parochial rate, or lastly, from a general fund to be reserved out of the fees received in the new cemeteries. The latter plan is preferred by the Rev. Frank Hewson, curate of St. Mary's, Birmingham :—

"I should say, it would be very possible," he remarks, "to have a cemetery on the verge of every large town, and a chaplain appointed in connexion with the Church of England, where all persons dying belonging to that Church might be buried; and this chaplain might give an account of the fees he received to the different incumbents from whose parishes the corpses came, and he might receive a certain salary, paid by them all. Nothing is more distressing to clergymen in large towns than the number of funerals they have to attend, it confines them so closely to the church."—Q. 1900.

The Rev. J. T. Robinson, incumbent of St. Andrew's, Holborn, approves of the same plan; he thinks "that a compensation should be made for the loss sustained by the clergy in their incomes, and that they should have no further responsibility with regard to the duties of interment."—(Q. 2814.) In answer to the objection that it would not be just that the clergy should retain the income if they did not perform the duty, Mr. Robinson replies that "if you put it out of their power to do the duty, you should compensate them for the loss of income."—(Q. 2816.) Another plan is, that the parochial clergy should perform the burial service for parishioners in the extra-parochial cemetery, and should receive the same fee as is now received for a burial in the parish churchyard. This is apparently the plan recommended by

the Committee. This plan is open to the objection that, either the parochial incumbent or his curate will receive a great addition to their labours on account of the necessity of going to a distance for the performance of funerals, or they will be made responsible for duties which they are forced to perform by deputy.—(See Mr. Robinson's evidence, Q. 2813, 2822.)

From the preceding account of the scheme of reform recommended by the Committee and the suggestions of their witnesses, it seems to us to follow, that the subject presents considerable practical difficulties, and that no legislative measure ought to be introduced into parliament by the government which has not received a careful and mature consideration.

We will advert, in conclusion, to some legal questions affecting the subject of interment, which have been nearly settled by a recent decision of the Court of Queen's Bench.

It seems to be clear that there is a right, vested in somebody, of burying in the parish churchyard the body of every person who dies in the parish.[1] And it is the duty of the parish minister to perform the burial service, according to the rites of the Church of England, over such body, if the person had been duly baptized, and was not disqualified by excommunication, suicide, or any other ground of exception recognised by the law.[2]

It is not however equally clear in whom the *duty*, and the accompanying *right*, of burying a dead body, reside. The law on this point was incidentally considered by the Court of Queen's Bench in the recent case of Reg. v. Stewart.[3] This was an application for a mandamus against the overseers of St. George's, Hanover Square, commanding them to remove and inter the body of a poor person who had died in St. George's Hospital within the parish. The Court refused the mandamus, on the ground that the burial of the dead is not one of the purposes of the 43 Eliz., and that the parish officers are not bound to bury the dead body of any person *not dying in a parish house.*

The Court, after some further remarks, proceed to say: "*It should seem* that the individual under whose roof a poor

[1] 1 Burn's Eccl. Law, 258.

[2] Canon 68, 1 Burn, 265.

[3] 12 Ad. & Ell. 773.

person dies is bound to carry the body decently covered to the place of burial: he cannot keep him unburied, *or do any thing which prevents Christian burial:* he cannot therefore cast him out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living; and for the same reason, he cannot carry him uncovered to the grave. [Sed qu. is he bound to bury him in a churchyard?] It will *probably* be found, therefore, that where a pauper dies in any parish house, poor-house, or union-house, that circumstance casts on the parish or union, as the case may be, [an obligation?] to bury the body; not by virtue of the statute of Elizabeth, but on the principles of the common law. In the present case, however, these principles would rather cast the burthen on the hospital than the parish."

It will be observed that the Court express their opinion on the point doubtingly, and that they do not go so far as to say distinctly, that a person who has the custody of a dead body is bound to give it *Christian* burial, though they say that he is bound to inter it, and to inter it in a decent covering.

We may be allowed to remark, that a considerable portion of the uncertainty as to the seat of the obligation to bury appears to have arisen from the figurative and elliptical nature of the language which has been employed, even in legal arguments, in treating of this subject. In all the cases and text-books which we have consulted on the matter, we find that a person's *right to be buried* is spoken of. Thus the Queen's Bench, in their well-considered decision in Reg. v. Stewart, say: "Every person dying in this country, and not within certain exclusions laid down by the ecclesiastical law, *has a right* to Christian burial; and that implies *the right to be carried* from the place where the body lies to the parish cemetery." Lord Stowell, in his celebrated judgment in Gilbert v. Buzzard, repeatedly uses the same phrase. For example: "The rule of law which says that *a man has a right to be buried* in his own churchyard, is to be found most certainly in many of our authoritative text-writers; but it is not quite so easy to find the rule which *gives him the right of burying a large chest or trunk in company with himself.* That is no part of *his original and absolute right* [i. e. of being buried], nor is it necessarily involved in it. *That right,* strictly taken, is, *to be returned* to his parent earth for dissolution, and *to be*

carried thither in a decent and inoffensive manner. When these purposes are answered, *his rights* are perhaps fully satisfied in the strict sense in which any claim, *in the nature of an absolute right,* can be deemed to extend."[1]

Now it is obvious that the expression, *a right to be buried,* is elliptical. A dead man can have no rights; and a living man cannot properly be said to have rights which do not come into existence until after his death. A man has a right to make a will; and that will after his death confers rights upon others; but the testator himself has no posthumous rights. The rights created by the will are the rights, not of the testator, but of the executors and legatees. No living man, therefore, can, with legal propriety, be said to have a right of being buried when he is dead. When he is dead, *somebody* is bound to bury his body, and that person has a right to bury the body *somewhere.* But to say that a dead man has a right to be buried, is not less absurd, as a legal proposition, than to say that he is bound to bury himself.

The concise and metaphorical expression in question may be often convenient, and may sometimes be used without prejudice to the cogency or perspicuity of the argument; but the effect of the ellipse has been, by attributing the right of sepulture to a dead body, to keep out of sight the person in whom the duty and right really reside, and thus to prevent the consideration of the practical question which must arise whenever the legal obligations connected with burial come to be discussed in a court of justice.

[1] 1 Haggard, 348.

ART. IV.—ON THE RIGHTS OF TENANTS IN COMMON OVER THE JOINT PROPERTY.

LAND comprising coal mines was devised to Ann Simpson and Julia Harrison in equal shares as tenants in common during their respective lives, with remainder to John Thomas in fee. Julia Harrison died, whereupon John Thomas became entitled in possession to one moiety as tenant in common with Ann Simpson, with remainder in fee as to the entirety. The coal mines were unopened at the time of the

decease of the testator, and John Thomas being desirous of working them, the question arose how the profits should be apportioned between him and Ann Simpson.

It was considered that John Thomas or his lessee could not be prevented by injunction from Chancery from working the coal by outstroke; that is, without breaking the surface, nor even by a pit or shaft from the surface.[1] In the latter case just cited, a tenant in common sought to restrain his co-tenant by injunction from ploughing ancient meadow, and the Lord Chancellor, Eldon, observed, "If one tenant in common is doing merely what any other owner of land might do, the other cannot have an injunction merely on the ground that he does not chose to do so; but if it amounts to destruction, the Court will interpose." Though it is clear that Lord Eldon did not consider ploughing up the meadow as destruction, yet he granted the injunction on the ground that the tenant in common, against whom it was sought, was in possession of the entirety under a lease from his co-tenant of his moiety, and Lord Eldon considered that, by such lease, he engaging as to one moiety to treat the land as an occupying tenant should treat it, could not deal with his own moiety as he might if he had not incurred that obligation; and his lordship stated the question to be, whether he must not get rid of that relation so voluntarily contracted, before he could exercise the power which he had before he entered into that contract, and his lordship expressly said "on that ground I shall grant the injunction."

It is somewhat remarkable, that about ten years before the case last cited, a similar question occurred in the Court of King's Bench, in the case of Martyn v. Knowllys,[2] which was not referred to. In that case, a tenant in common, who occupied the entirety under a lease as to one moiety from his co-tenant, cut down timber, and an action on the case in the nature of waste was brought against him by his co-tenant, and a verdict was found for the plaintiff; but Lord Kenyon, C. J. and the Court of King's Bench held that it could not be maintained, his lordship observing "it had neither principle nor authority for its support. The defendant cannot be in a

[1] Hole v. Thomas, 7 Ves. 589; Twort v. Twort, 16 Ves. 128.

[2] 8 Term Rep. 145.

worse situation by being tenant to the plaintiff of his moiety than he would have been in if the plaintiff had not demised to him, and considered in that point of view this action cannot be supported. This is an action ex delicto." But though Lord Kenyon seems to have differed from Lord Eldon as to the effect to be attributed to the lease, he states the general rule much in the same way. "If one tenant in common misuse that which he has in common with another, he is answerable to the other in an action as for misfeazance; but here it does not appear that the defendant committed anything like waste, no injury was done to the inheritance, no timber was improperly felled; the defendant only cut those trees that were fit to be cut, and if he were liable in such an action as this, it would have the effect of enabling one tenant in common to prevent the others taking the fair profits of their estate. In another form of action the plaintiff will be entitled to recover a moiety of the value of the trees that were cut."

We think that the working of coal mines by a pit from the surface would not be deemed an act of destruction by a tenant in common, for that is the usual way of deriving profit from minerals within the soil; and if, to refer to the case with which we started, John Thomas could be restrained either by an action at law or injunction from Chancery from working the mines, it might be the means of depriving him entirely of the value of the coal; for, assuming that the coal field were not large enough to be worked by itself, if the time passed when it might be worked together with the adjoining coal, it could not be worked at all, and thus the value of it would be lost. This would be the consequence if the consent of Ann Simpson were necessary to the working of the coal. John Thomas might be compelled either to abandon his property or to submit to any terms that she might impose. This case shows very clearly the wisdom of the law propounded by Lords Eldon and Kenyon.

But though Ann Simpson could not prevent the coal being worked, it is clear that she might maintain a bill for an account of the profits thence accruing.[1] How the profits in such a case would be disposed of by the Court of Chancery is not very clear, but we think the true rule may be deduced

[1] Prince v. Heylin, 1 Atkins, 493; and see 4 You. & Coll. 182.

from the case of Wickham v. Wickham;[1] and, if so, the profits from the coal mine would be considered as capital, or part of the corpus of the estate, and Ann Simpson would be entitled to one moiety of the annual income during her life.

In Denys v. Shuckburgh,[2] Lady Charlotte Denys was entitled to one-fourth part of the profits of a lead mine during her life, and she was also entitled to another fourth part of the profits during the life of George Earl of Pomfret, and Sir George Denys was entitled to another fourth part of the same profits, and the reversion of one-fourth after the death of Earl George, to the profits of which Lady Charlotte Denys was entitled during the life of Earl George, as before mentioned. Mr. Baron Alderson, in delivering judgment, gave the following clear exposition of the law upon several points arising from the fact of a tenant in common receiving more than a due share of the profits of the common property:—

"It seems to me quite clear that Lady Charlotte Denys, against whose personal representatives this bill has been filed, took an interest under the conveyance of 1813, which expired, as to one-fourth of the mines in question, upon the death of her brother, Earl George; and that she, notwithstanding, continued to receive the profits arising both from that one-fourth which she held in her own right, and the one-fourth the interest in which had then ceased; while, on the contrary, the plaintiff, Sir George Denys, continued to receive as before the profits arising from one-fourth, being all the while entitled to those of the one-fourth which his mother was receiving. All this was done bonâ fide without any fraud, and I think without any arrangement between them, under a misapprehension of their respective rights. It is said that this was an adverse possession of the one-fourth share by Lady Charlotte; but I do not think that it was so, unless it can be contended that every tenant in common receiving more than his share, must be considered as in adverse possession of the surplus so received by him. This cannot be maintained with propriety; and this is only that case. Both Lady Charlotte and the plaintiff had a right to receive, and did during all the time receive a share in those rents and profits, as tenants in common. Then this seems to me to fall expressly under

[1] 19 Ves. 419. [2] 4 You. & Coll. 42.

the Statute of Anne,[1] which gives in such cases an action of account against the co-tenant in common who has received more than his share. And I apprehend, that where an action of account will lie, a bill for an account may be sustained. I am, therefore, of opinion that the plaintiff is entitled to an account, and I shall now proceed to consider from what time such account ought to go. The plaintiff contends that he has established that this receipt has been by mistake of fact, and that this is on the same footing as fraud, and prevents the operation, if made out, of the Statute of Limitations, which in equity is adopted as a guide, but is not at law binding on the Court. I agree in that conclusion if the circumstances of the case warrant it. But here, it seems to me, that the plaintiff had the means, with proper diligence, of removing the misapprehension of fact under which I think he did labour. He had in his power the deed on which the question turns; and, although it is perhaps rather obscurely worded, still I think he has allowed too much time to elapse not to be fairly considered as guilty of some negligence; and a Court of Equity, unless the mistake be clear, and the party be without blame or neglect in not having discovered it earlier, ought, in exercise of a sound discretion, to adopt the rule given by the statute law as its guide. That is what I shall do here. At law Sir George Denys would be barred from recovering all sums received more than six years before filing his bill, had he not been absent from England and within one of the exceptions of the statute. But he went abroad, and so continued from 1832 to the death of Lady Charlotte. I think, therefore, that the account must go as far back as his departure from England, and that the Master should take an account of all sums received after that time by Lady Charlotte."

As a practical inference from the foregoing observations, we would suggest, that, if a lease be made of an undivided moiety, it should contain an express power for the lessor to distrain.

W. C. W.

[1] 4 & 5 Anne, c. 16, s. 27. See 4 You. & Col. 188.

ART. V.—ESTATES FOR LIFE.

A practical Treatise on the Law of Estates for Life. By Andrew Bisset, of Lincoln's Inn, Esq., Barrister at Law. Stevens and Norton. London. 1842.

THIS is an excellent book, especially for students, for it is readable; it seems to contain all the facts of the law within its professed range, with, by means of judicious extracts from established authorities, sufficient explanation and illustration. It is evidently the work of one who has considered his subject carefully, and has not merely used his scissors. It is, too, in truth, a treatise on the Law of Life Estates as it now is, with all the various alterations and modifications introduced by recent statutes and cases.

Mr. Bisset (p. 110) notices the change which has taken place in Sir Edward Sugden's opinion as to inserting a declaration against dower in conveyances to purchasers, and inclines to Sir Edward's second opinion, that such a declaration should not be inserted without express instructions. Of course such a declaration is inoperative against the dower of a wife who was married before 2nd January, 1834; and as to wives married since that time, Sir Edward thinks they should not be barred of their chance of dower, as the husband can charge, sell, convey, or devise his estate free from dower; and observes, "if the owner allow his estate to descend, the claim of the widow is equal to that of issue, and superior to that of a lineal ancestor or a distant relative."

But *pace tanti viri,* Sir Edward's observations have not exhausted the subject. There is no doubt his argument would have great weight if the claim of what we may call a modern widow to dower could only arise in case of an intestacy. But is that the fact? Suppose a testator, married since 1834, purchases land, and bequeathes all his personal estate to his wife, intending that to be her sole provision, but not expressing such intention in his will, and devises "all his real estate" to his children: Would the children, as the testator intended, take his lands free from the claim of his widow to dower? The question is not free from doubt, and the Courts may give an answer in the negative, and if so, the intention of the testator would be defeated if Sir Edward's advice were followed

by the conveyancer who drew his conveyance. The act says that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will. But in the will supposed, and it is not an uncommon case, the husband does not dispose of his land, only of *his estate*, and that does not comprehend his wife's title to dower. And moreover, it should be considered that in case of an intestacy a widow becomes entitled to a considerable portion of her husband's personal estate absolutely, a species of property which scarcely existed when dower was assigned as her maintenance. Again, conveyancers have for about half a century, since Fearne's invention of the dower uses, been accustomed to treat dower as a nuisance, and to bar the wife absolutely; and yet undoubtedly a power to convey and devise might have been given to the husband without proceeding to that extremity. On the whole we are inclined to think that dower is a provision inconsistent with existing circumstances, and that when the right to it shall arise even with respect to modern widows, the claim will be very often contrary to the intention of the husband. We cannot therefore say that conveyancers who insert a declaration against dower in their drafts of purchase-deeds, and thereby offer it to the consideration of the purchaser, act improvidently. We may observe, that if there be a declaration against dower in a purchase-deed, it should be executed by the purchaser.

In p. 166, our author allows too narrow a sense to the word "hereditament," which signifies any subject-matter that may be inherited, if limited to heirs, and not merely subjects that are limited to heirs. And in p. 167, he gives at length Mr. Justice Bayley's judgment in Doe v. Robinson, which, though strongly impugned in an able text book as untenable upon principle,[1] has been assented to by Lord Chancellor Sugden, who said in a late case,[2] "I do not quarrel with the case of Doe v. Robinson, which has been the subject of so much criticism at the bar. That case, fairly following the analogy to the rule of law as to estates of inheritance, decided that without words showing an intention to give more than a life estate, a devisee of an estate *pur autre vie* takes only for his own life.

[1] 1 Hayes's Convey. p. 199, note.

[2] Allen v. Allen, 2 Dru. & W. 327.

That decision is in my opinion quite right, although it has been much observed upon."

Mr. Bisset seems to have overlooked the important point confirmed (for it had been before decided) in Slade v. Patteson,[1] viz. that a quasi tenant in tail in remainder of an estate pur autre vie cannot alone bar the remainders over.

Mr. Bisset notices the decision of Sir Thomas Plumer, M.R. in the Marquis of Lansdowne v. The Marchioness Dowager of Lansdowne,[2] that the executors of a tenant for life without impeachment of waste are not responsible in equity in respect of waste *permitted* by their testator. The point was subsequently submitted to the consideration of the late Mr. John Bell and Mr. Swanston, and our readers will be gratified by having a transcript of their very able opinions. The case was simply, that Mrs. Fontinell, who was tenant for life without impeachment of waste, with remainder to C. for life, with remainder to R. in fee, allowed the farm houses and buildings on the settled estate to become dilapidated and ruinous.

Mr. Bell's Opinion.

"This is only a case of permissive waste; not one where, as in the case of timber cut, the tenant for life has put the money for which the timber was sold into her own pocket, where though trover would not lie against the executor at law, an action for money had and received might lie, according to Hambly v. Trott;[3] and I am not aware of any case where the executor of a tenant for life has been charged after her death with any sum of money for such permissive waste, which would be in fact to charge an executor with damages for the wrong of the testator. I am therefore of opinion the personal representative of the late Mrs. Fontinell is not liable to make good the dilapidations in question. Dilapidations in case of ecclesiastical preferments depend on a rule of law applicable to them only. John Bell."

"*Lincoln's Inn, 30th May,* 1823."

Mr. Swanston's Opinion.

"The representatives of a deceased tenant for life being re-

[1] 14 Law Journal, 51; and see Allen v. Allen, 2 Dru. & W. 334.

[2] 1 Jac. & W. 522.

[3] Cowper, 371. See Powell v. Rees, 7 Adol. & Ell. 426.

sponsible in equity for all commissive waste for which they are not responsible at law,[1] it would seem a reasonable inference that they are responsible also for permissive waste. The foundation of responsibility is a profit wrongfully obtained from the possession of the estate to the prejudice of the parties entitled in remainder, and it seems immaterial whether the profits consist of money acquired by the sale of that which ought not to have been sold, or money saved which ought to have been expended for the benefit of the inheritance. The same pecuniary advantage accrues to the tenant for life, whether he receives a sum to which he was not entitled, or retains a sum which it was incumbent on him to expend, and accrues in both cases alike to the injury of the reversioner. Upon principle, therefore, I should have thought the representatives of a tenant for life responsible for permissive no less than for commissive waste; but the contrary doctrine is fully established by decision.[2] In confining relief to commissive as opposed to permissive waste, the Court seems to have proceeded on this distinction, that in the former instance the tenant for life originally acquired by his wrongful act property for which he might be compelled to account, while in the latter, though he profited at the expense of the reversioner, he appropriated nothing which was not originally his. However questionable this reasoning may appear, sanctioned as it is by anthority, I cannot advise an attempt to impeach it. So marked indeed is the difference between permissive and commissive waste in the view of a Court of Equity, that according to the established practice (notwithstanding the order in Caldwell v. Baylis,[3] which must be referred to the peculiar circumstances of the case) injunctions are not issued against permissive waste.[4]

CLEMENT T. SWANSTON."

"*Chancery Lane, 30th July,* 1823."

[1] Bishop of Winchester v. Knight, 1 P. W. 40; Lansdowne v. Lansdowne, 1 Madd. 116.

[2] Lord Castlemain v. Craven, 22 Vin. Ab. 523; Turner v. Buck, ibid.; Lansdowne v. Lansdowne, 1 Jac. & W. 522.

[3] 2 Mer. 408.

[4] Wood v. Gaynon, Amb. 395; Snell v. Snell, MS.; Gibbon v. Gibbon, MS.

W. C. W.

ART. VI.—PRACTICAL POINTS.

I.—*On the Rule against Perpetuities.*

The rule against perpetuities is now clearly and firmly settled, and it allows property to be settled during a life or lives in being and twenty-one years after; this is the simple rule, and it is unnecessary to speak of a period or periods of gestation, for in fact a child *en ventre sa mère* is considered for the purpose of the rule, as a life in being. In ascertaining the effect of a demise or a bequest in a will with reference to this rule, a person born during the lifetime of the testator, though after the date of the will, may be considered as a life in being. The following form shows how far real estate may be tied up, but a testator by making his own will, and sowing seeds for a few doubtful questions, may more effectually tie it up if the parties are compelled to resort to the Court of Chancery; in such a case the event will perhaps be, that all estates tail and remainders over will be defeated and destroyed, without the aid of any disentailing deed. The form we propose is simply as follows: I hereby devise all my real estate to the uses following; that is to say, to the use of my cousin John Nicholson for his life, and after his decease to the use of his three sons, Richard, Thomas and Robert, and every other son of my said cousin John Nicholson, begotten in my lifetime and born before or in due time after my decease, and of their respective issue male severally and in succession according to seniority of age, so that every elder son and his issue male may be preferred to every younger son and his issue male, and so that every such son may take an estate for his natural life, with remainder to his first and every subsequent son successively according to seniority in tail male: and on failure of such issue, to the use of all and every the other son and sons of my said cousin John Nicholson, to be begotten after my decease, severally and successively, according to their respective seniorities in tail male. General clause that tenants for life are to be unimpeachable for waste, and that estates shall be interposed for preserving contingent remainders.

II.—*A Power of Sale unlimited as to Time.*

We may congratulate our readers, that the objection which

has been raised with respect to powers of sale being unlimited as to time, is nearly at an end; for the Lord Chancellor Cottenham has expressed a strong opinion, that a power of sale, though unlimited in terms, is valid if exercised within the prescribed limits against perpetuities. John Wood[1] devised one-fifth of his property to each of his three sons, John, Henry, and Thomas; he then devised another fifth to John and Henry, in trust to pay the income to his son William for life, and, after his decease, upon trust to convey the same fifth to his children, in manner in the said will mentioned: and the testator devised the remaining one-fifth to his sons John and Henry, upon trust, in case his daughter Eliza should marry under twenty-five, to convey and settle the said fifth in manner in the said will mentioned. And the will contained a proviso, that it should be lawful for John and Henry, during the continuance of the trusts thereby reposed in them, with the consent of the persons for the time being in the possession of the premises proposed to be sold, or of their own authority, if such persons should be in their minority, to sell and dispose of the hereditaments thereby devised, or such parts thereof as should be subject to such continuing trusts; with power to give receipts for the purchase money.

William, the son of the testator, died, leaving infant children, and Eliza, the daughter, married under twenty-five, when a settlement was made pursuant to the will.

The trustees then contracted to sell, and the title was objected to on the ground that their power of sale was at an end.

It was held by the Court, that the power still existed as to the share devised in trust for William and his children, but that the power given by the will as to Eliza's share was at an end, the trusts of the will with respect to that share having no longer any continuance.

It however appeared, that John and Henry were also the trustees in Eliza's marriage settlement, and though an express power of sale was not thereby given to them, the Lord Chancellor held, that there was a power or trust for sale *by implication*, and the decision was, that the trustees could make a good title, which the purchaser was decreed to take. The Lord Chancellor observed—" I must not pass over an objection

[1] Wood v. White, 4 Myl. & Cr. 460.

raised as to the whole of the power under the will, namely, that it was too remote, and tended to a perpetuity; being of opinion that the trust as to William's share would determine upon his children attaining twenty-one, and that the trusts as to Eliza's share would determine upon her attaining twenty-five, or marrying, this objection may be considered as disposed of; but if it were otherwise, the sale in question is within the permitted period, and there would not, I think, be much doubt of its validity until the expiration of that period."

We may observe, that if lands be conveyed to trustees upon trust to sell, and then the sale monies are settled, it cannot be objected that the trust for sale is invalid, because it is unlimited as to time. But if the same lands are settled upon certain trusts, and a power to sell them is given to the trustees, it has been contended, that such power must be expressly limited, or otherwise it is void. Now we think that the end and object of the law,—to prevent land being locked up,—will be sufficiently protected if it be held according to the Chancellor's opinion, that such a power is valid if it be exercised within the prescribed period.

III.—*Stamp Duty on Conveyances from Assignees of a Bankrupt.*

A question has been raised in practice, whether a conveyance from assignees of a bankrupt to a purchaser should bear the ad valorem stamp duty, or indeed any stamp duty whatever. The doubt has arisen from the case of Flather v. Stubbs and another,[1] in which it was decided, that an agreement for sale entered into by assignees of a bankrupt, did not require any stamp. This decision was made on the 98th section of the Bankrupt Act, 6 Geo. IV. c. 16, which enacts in substance, that all conveyances and other assurances of any real estate belonging to any bankrupt, and which after the execution of such conveyances or assurances respectively shall either at law or in equity be or remain the estate and property of such bankrupt or his assignees, and also that all powers of attorney, affidavits, and all other instruments and writings whatsoever, relating solely to the estate or effects of any bankrupt, shall not be liable to any stamp duty, or

[1] 6 Jur. 102.

any other government duty whatever. In the case referred to the Court held, that the contract for sale was within the words, all other instruments and writings whatsoever, considering it, of course, to relate solely to the estate of the bankrupt. This case may be considered to have been rightly decided, because even after the signing of the contract by the assignees, the estate contracted to be sold may be said to have remained solely the property of the bankrupt, until at least the stipulated price was paid; but this decision seems to us to furnish no ground whatever for the question which has been raised respecting conveyances from assignees of a bankrupt: knowing, however, that doubts have been entertained on the point, we think it worth while to notice it, and to clear away the doubt, though it be but a cobweb. It is sufficient to say, that the former part of sect. 98 of 6 Geo. IV. c. 16, provides expressly for conveyances and other such assurances, and only exempts such instruments from stamp duty if after the execution thereof the premises remain the estate and property of the bankrupt or his assignees, and consequently the general words, instruments and writings whatsoever, in the latter part of that section, cannot be held to include conveyances, which are expressly provided for: Generalis clausula non porrigitur ad ea quæ specialiter sunt comprehensa.

But it was urged in a case where the stamp duty amounted to a considerable sum, is there not sufficient doubt to authorise us to engross the deed on plain parchment, especially as it may be stamped at any time hereafter, on payment of the legal duty and 10*l.* for each skin; and Mr. Chitty's useful Treatise on the Stamp Laws was referred to as an authority. Mr. Chitty cites the 2d sect. of the 37 Geo. III. c. 136, to show that deeds unstamped may be duly stamped, on payment of the then legal duty, with a penalty of 10*l.* per skin. Upon referring, however, to the act itself, we find it only empowers the Commissioners to direct unstamped deeds to be duly stamped as aforesaid, and does not direct or oblige them, so that it is a matter within the discretion of the Commisioners; and we apprehend they would not willingly exercise their power, without some better reason for the deed being unstamped than that stated above.

But this is not all; by the 5 W. & M. c. 21, s. 11, it is

enacted, that if any person or persons shall engross or write, or cause to be engrossed or written upon any vellum, parchment, or paper, any of the matters or things for which the same was thereby charged to pay any duty, before such time as the same should be marked or stamped as therein mentioned, such person so offending shall, for every such offence, forfeit the sum of 500*l.*: the 9 & 10 Will. III. c. 25, s. 59, after imposing further duties, and without repealing the preceding act, imposes a penalty of 10*l.* for writing on parchment or paper not stamped pursuant to the act; both these acts appear to be in force: for by the last Stamp Act, 55 Geo. III. c. 184, it is enacted, that all the powers, provisions, clauses, regulations and directions, fines, forfeitures, pains and penalties contained in and imposed by the several acts of Parliament relating to the duties thereby repealed, and the several acts of Parliament relating to any prior duties of the same kind or description, shall be of full force and effect. The enactments just cited are qualified by 44 Geo. III. c. 98, s. 24, which enacts, that in any case where it shall appear to the Commissioners that any instrument, except bills of exchange, &c. required by law to be written on stamped parchment or paper hath been written on parchment or paper not duly stamped, either by accident or inadvertency, or from urgent necessity, or unavoidable circumstances, and without any wilful delay or intention in any party or parties thereto to evade the stamp duties, and such instrument shall be brought to the said Commissioners to be stamped within twelve months after the making or execution thereof, it shall be lawful for such Commissioners to remit the penalty payable on stamping such instrument, or any part thereof, and every person concerned in writing or in executing such instrument shall be freed and discharged from all further penalties or forfeitures in respect thereof. Under the equity of this enactment, we believe, but certainly not under its words, parties are allowed to send out deeds written on unstamped parchment or paper, to be executed abroad, and if the same are brought to be stamped within twelve months after the execution thereof, no penalty is charged.

W. C. W.

ART. VII.—LIFE OF THE LATE FRANCIS HARGRAVE, ESQ.

We have now recorded the career of most of the great lawyers, who have achieved wealth, titles and fame. We have traced the gradual ascent of the grocer's apprentice (King), and the barber's son (Tenterden), to the seat of Chief Justice of England, and have rejoiced over the course of the brothers Scott, working their way from the coal-fitter's yard at Newcastle to the heights of the civil and common law, showing that neither lowliness of birth, nor absence of fortune, nor delay of opportunity, is sufficient to subdue the progressive force of talent and industry. But the use of biography teaching by examples would be imperfect—our portraiture of legal worthies would be as deceitful, as that of the limner of royalty when required to paint without shade, were we to conceal all mention of the learned and laborious lawyers, who will be remembered beyond their generation, and yet have failed in all the personal and immediate objects of their profession. In the legal as in other circles, "the race is not always to the swift, nor the battle to the strong, neither yet bread to the wise, nor riches to the men of understanding."

From defects of temperament "that lean to virtue's side"—an absence of prudence, and an inaptitude in grasping occasions of worldly advancement, the subject of our present memoir failed to attain that rank to which his profound learning and rare worth entitled him, and a great moral lesson may be learnt from the narrative of his toils and the history of his misfortunes.

Mr. Hargrave was the son of an eminent attorney in London, and born in the year 1741. His mother was celebrated by the title of "the Widow of the Wood," and had first married Mr. Whitby, afterwards Mr. Robins, then Sir William Wolseley, and finally Mr. Hargrave, to whom she brought a large jointure. Her husband's imprudence in becoming surety for a friend who betrayed his confidence, joined to general extravagance, having gradually dissipated this fortune, compelled them to take refuge in France from the claims of creditors, and to become trespassers on the piety of their son. He had been placed at the Charter House at the beginning of his parents' misfortunes, and for the completion of his education

there and at Oxford he was indebted to his paternal uncle, Major Hargrave, an old campaigner, who had distinguished himself at Falkirk and Culloden.

In 1760, when in the first form of the Charter House, young Hargrave was entered of Lincoln's Inn, and in 1764 took chambers there, and began practice as a Chancery lawyer. He married at, for a lawyer, the premature age of twenty-three, Miss Diana Fountaine, the daughter of a clergyman who had superintended the education of several noblemen, to the friendship of one of whose pupils, the amiable Lord North, Mr. Hargrave was afterwards indebted for much encouragement. He was soon engaged as chamber counsel in several important cases of real property, heard his own voice in court not without fear and trembling within a twelvemonth after his call, and in his fourth professional year pleaded as junior at the bar of the House of Lords.

But his name had not become familiar to the public till the seventh year after his call to the bar, when he delivered an elaborate argument in behalf of James Sommerset, a negro, before the King's Bench, in Hilary Term 1772, to prove the absolute illegality of enforcing domestic slavery in England.

Lord Mansfield had issued a writ of habeas corpus on affidavits that the negro was confined in irons on board a ship lying in the Thames, and bound for Jamaica. The commander produced Sommerset in obedience to the writ, and returned for cause of detainer, that he had been purchased as a slave in Virginia, and brought by his master to England, where, on his refusing to remain in service, he was carried on board the ship. The validity of this return was impugned by Serjeant Davy, fresh from travelling the Norfolk circuit, under the *surveillance* and in the company of a sheriff's officer, by Serjeant Glynn, Mr. Mansfield, Mr. Alleyne, and Mr. Hargrave. The junior counsel laboured under the disadvantage of an embarrassed manner, and hesitating delivery, but so far as research, reasoning, and appeals to sensibility could atone for these deficiencies, made ample compensation. The brand of public opinion had not yet been stamped on slavery, and the able argument (afterwards published) of this high-minded advocate first called general attention to its true character. The following may be considered a fair specimen of his earnest advocacy:

"The right claimed by Mr. Stuart to the detention of the negro is founded on the condition of slavery in which he was before his master brought him into England; and if that right be here recognized, domestic slavery with its horrid train of evils may be lawfully imported into this country at the discretion of every individual, foreign and native. It will come not only from our colonies, and those of other European nations, but from Poland, Russia, Spain, and Turkey, from the coast of Barbary, from the west and east coasts of Africa, and from every part of the world where it still continues to torment and dishonour the human species. It will be transmitted to us in all its various forms, in all the gradations of inventive cruelty, and by an universal reception of slavery, this country, so famous for public liberty, will become the chief seat of private tyranny."[1]

For this seasonable publication Mr. Hargrave was rewarded with what he loved most dearly, "laudari a laudato viro," the applause of the most distinguished in his profession. We may guess the feelings with which the young author read the following complimentary notes from Lord Mansfield:

"Bloomsbury, 14th May, 1772.

"Lord Mansfield sends his compliments to Mr. Hargrave, and wishes he would send him his argument, as he is desirous of reading it."

Being furnished with all that had been then transcribed, with an apology for its imperfection, the Chief Justice again expressed his acknowledgments:

"Lord Mansfield returns Mr. Hargrave many thanks, and will be extremely obliged to him for the rest when it is completed. Mr. Hargrave has no reason to make any apology; his argument was a most able performance, and extremely well delivered, as well that part that was not wrote, as that which was."

For another letter of compliment, written in that frank and hearty spirit with which one clever barrister can afford to recognize the excellence of another, Mr. Hargrave was indebted to Mr. Macdonald, the future Chief Baron.

"Oxford, November 22, 1772.

"Dear Sir,—Don't be offended if I tell you that a book, intituled

[1] The same question being afterwards mooted in the Scottish Courts, a pamphlet was published with one of the most appropriate mottoes prefixed that we ever remember to have met with—

"Quamvis ille niger, quamvis tu candidus esses."

'An Argument in the Negro Cause,' has been perused by some persons of great taste and good judgment here, who have uno ore voted it a performance that does the author everlasting credit. This is at least a testimony of the clear and forcible style, as well as of the perspicuity of that work, when persons not conversant in legal reading peruse it with great satisfaction. They lose indeed much pleasure which those of the profession must receive; I would undergo ten times over the misery I have suffered (from severe illness) to have been the author of it. Adieu. Do as much justice to your European as to your African clients, and believe me ever

"Your affectionate friend and servant,

"A. MACDONALD."

The next few years, though enlivened by no very prosperous adventure, and marked with untiring industry, may be classed among the happiest of Mr. Hargrave's chequered life. He dived into the mysteries of real property law, annotated Littleton with all the zeal of a German commentator for his favourite classic, and emerged into court after performing the functions of the equity draftsman, with the dust of the law library upon him. Selecting Chief Justice Hale for a model, he sought to emulate the activity of the worthy judge in collecting legal manuscripts, purchasing works of rare learning from the proceeds of professional industry, and illustrating the science of law out of pure affection for it. In the following eulogy upon his great exemplar he not obscurely shadowed forth the path he had himself begun to tread:

"Lord Hale, not content with his acknowledged pre-eminence as a judge, performed a double service; for he added to the fatigues, which official duty exacted, a voluntary sacrifice of his hours of retirement to the toil of writing, for the noble and generous purpose of methodizing and illustrating the laws of his country. In pursuit of this object he submitted to the most difficult and painful researches, drawing his materials more from the secret and difficult recesses of ancient records, and other rare manuscripts, than from printed books. So regardless, too, was he of expense in this mode of obtaining lights for the darker subjects of law, that, notwithstanding the narrowness of his fortune, and the largeness of his family, those manuscripts alone, which at his death he gave to Lincoln's Inn, cost him about 1500*l.*, a sum which, as he left an estate of not quite 900*l.* a-year, was, according to the probable price of lands at his death, equal to a very considerable part of his whole fortune."

In 1774, Mr. Hargrave wrote an excellent treatise on the law relating to real property: in 1777, he published his elaborate "Reasons against some parts of the Bill to restrain the raising of Money by the Sale of Life Annuities;" and shortly afterwards gave to the world a most valuable and complete edition of the State Trials, enriched with curious records from the British Museum, and useful notes, though tinged with Whiggism, upon constitutional history.

The printing of the work in folio retarded that rapid and profitable sale to which it was entitled from its intrinsic merits. By another publication (that of "Law Tracts"), Mr. Hargrave found himself a heavy loser. "He discovered" (to quote his own expressive words), "to his mortification and cost, that the law taste of the times was not what he supposed. His motto was, 'Longis laboribus, tamen dubiis, forsan adversis.' The motto had a larger scope. If in that also it was a prophecy, it has been long fulfilled."

The recompence which Mr. Hargrave received for his professional researches out of court was too frequently incommensurate to their magnitude and importance. Among all the vulgar errors refuted by Sir Thomas Brown, there was none more gross than the opinion that still floats in society, of professional men being overpaid. After fifteen years of more consuming labour than ever wore down the banker at his counter, or the merchant at his desk, Mr. Hargrave could with difficulty provide a competence for the numerous family-connexions which clung to him for support. In addition to his own five children, he had taken under his roof the orphan family of a younger brother, consisting of a son and three daughters. This young man went out early as a cadet in the East India Company's service, and was afterwards joined in India by his sisters, who were there married. To the same land of promise Mr. Hargrave himself looked for extrication from pecuniary embarrassment.

In 1778, a vacancy occurred on the Bengal bench, and powerful pretensions were exhibited on the part of Mr. Hargrave. At this period he stood so high in favour with the Lord Chancellor Thurlow and Lord North, that it was supposed the office had been kept open to suit his convenience, and his name actually appeared in the Court Calendar for two

subsequent years as the successful candidate. Sir William Jones, who, with his Oriental longings, yearned for the post, wrote to inquire if a mastership in Chancery would not be equally agreeable. His answer reflects the highest credit on the kindly and honourable feelings of the writer. He dates his letter from Boswell Court, 5th July, 1778, and accounts for not writing sooner by the wish to be at liberty to be open and explicit with him, and that he was still under the same difficulty. He then proceeds to say:—

"I confess that my original objections to going as a judge to Bengal at length yielded to very pressing reasons of convenience, and that I therefore explained my wishes where only they had a chance of being effectually attended to. But at the same time I acknowledged the superiority of your pretensions, and I stated my desire in a manner which evinced that nothing less than the particular situation of my affairs could prompt me to be a candidate for an office, which your rare and extraordinary endowments so strongly qualify you to fill, and to which the most valuable of my few acquirements are certainly foreign and inapplicable. Nay, since your letter, I have even gone the length of almost retreating from my first application, though in so doing I contradicted my own judgment, and that of several friends. What the event is likely to be, I am not able to guess.

"PS. One line, assuring me that the explanation I now send is satisfactory, will relieve me from a great deal of pain."

We know not where to find, not even in Sir T. Herbert's model of a holy lawyer, a more finished specimen of chivalrous courtesy. His scruples were of course too delicate to be appreciated by the dispensers of patronage, and the gentle, almost reluctant suitor, was bowed out of the place. As some compensation, he received the appointment of Counsel to the Treasury, with a salary of £600 per annum. This was owing to the influence of Lord North. The Chancellor, Lord Thurlow, whose strong sense and acuteness far exceeded his erudition, sought him out for private consultation, and relied upon his industry for aid in the preparation of several elaborate judgments. Mr. Hargrave was in consequence popularly known in the profession by the soubriquet of the lion's provider. An occasional growl disturbed their intimacy. In the eagerness of a supposed discovery, that the rule in Shelley's case, somewhat more abstruse than the fifth proposition in

Euclid, had been misunderstood by many great lawyers, and, among others, by Blackstone, who did not construe the rule as imperative, Mr. Hargrave, undeterred by thoughts of cost, rushed again into print, and the evening before publication sent his Treatise, in the flutter of expectant praise, to the Chancellor. It called forth, much to his surprise and consternation, an angry roar from the Lion of the Chancery Court:

"After the communication with which Mr. Hargrave favoured him, it occurs to the Chancellor that he was not explicit enough with him on two points: his accuracy in the representation of their former conversations on the subject, and the propriety of publishing Mr. Justice Blackstone's private conversation at all, after his death. There is no remembering phrases so long. But he is confident it was impossible that he should ever have meant to speak of the rule in Shelley's case as a rule of construction, or in any other light than as a rule of legal policy. If any thing should, notwithstanding, be conveyed to that effect, it will not be wondered that he should contradict it; for which he thinks he may apply to many public declarations, and many private conversations. This notion appears to him to be so far from a new discovery, that he cannot help thinking it would amount to a reflection on the memory of Mr. Justice Blackstone, to convey to the public he held otherwise in a private conversation. If Mr. Hargrave thinks otherwise, he has every right to be the sole judge of that matter, and the Chancellor would not have said a word on the subject, if he had not thought it due to the communication Mr. Hargrave made of his observations."

The same evening that Mr. Hargrave received this minatory note, the Chancellor sent back Mr. Justice Blackstone's argument, with further remarks: "He agrees with the executors in their judgment to suppress it. It was hastily composed, and still more unfortunately corrected."

With that nice sense of honour by which Mr. Hargrave was invariably actuated, he perceived the necessity for an immediate explanation, and sent a feeling and most characteristic apology, which breathes throughout the spirit of a gentleman:

"Boswell Court, Sat. Nov. 11, 1786.

"My Lord,—I was honoured with your lordship's notes of yesterday. The second did not reach me till about eight at night. That they have made me unhappy, I cannot conceal. Yet I think that the openness of my communication to your lordship, with the

respectful explanation of its cause, did not seem to lead to the production of so harsh an effect.

"In consequence of reading the manuscript of Judge Blackstone's argument in Perrin and Blake, your lordship has written to me in terms which imply, that I am publishing that argument in direct opposition to the intention of his executors, and that they have thought fit to suppress it. This really strikes me as imputation. If it was well founded, I should not easily be reconciled to my conduct in publishing the argument. But I actually explained to your lordship that I bought it of a person, who derived his title to it from Mr. Clitherow, the sole surviving executor of Judge Blackstone; and in the manuscript which your lordship read, there is an entry by me, expressing the day I bought it, the person of whom, and the price I gave. Alarmed, however, by your lordship's observation upon me, I this morning sent to Mr. Brooke, of whom I bought the manuscript, and he repeated to me the explanation under which he sold the manuscript to me; and to confirm his account, he has since written to me; and to remove all uneasiness, he has deposited with me a letter from Mr. Clitherow on the subject, authorizing Mr. Cadell the bookseller to sell to Mr. Brooke, with Mr. Clitherow's receipt for the purchase-money. These papers I send to your lordship, in order to clear myself from all suspicion of wrong in this business. When you have read them, I beg to have them back for my future protection in a point on which I had carelessly thought evidence unnecessary.

"Another remark of your lordship relates to the propriety of my manner of introducing a reference to conversation with Mr. Justice Blackstone. I trust that I have as much delicacy on the subject of conversation as most persons. Yet I still think that my manner of reference was unexceptionable. However, in deference to your lordship's better judgment, I have now so changed the mode of expression, as I trust to keep me clear of your lordship's objection.

"In respect to the other points on the subject of the rule in Shelley's case, though my deference to your lordship's judgment is not confined within any other than very extended limits, and though I am very conscious of my own feebleness of mind, yet I cannot say that in this instance I concur in your lordship's ideas as disclosed in your notes of yesterday and the day before. Besides, it is now too late for me to retreat, and I must take my chance with public, or rather professional opinion, which, should your lordship's impressions be known, will be poor indeed.—With the greatest respect, I have the honour to be your lordship's most obliged and faithful servant, "FRANCIS HARGRAVE."

The author had thought it probable that the correspondence between the Lord Chancellor Thurlow and himself on the rule in Shelley's case would here have terminated. But it was not quite so; for on the third day after the author's letter of the 10th November, 1786, to his lordship, he honoured the author with one farther note on the subject, which was without date and as follows:—

"The Chancellor presents his best respects to Mr. Hargrave. He intimated nothing concerning his manner of coming at the manuscript. He collected the judgment of the executors was to suppress it, from their not publishing it themselves before. He has nothing to do with the reason given by Mr. Clitherow for altering his mind. But he still thinks that if Mr. Justice Blackstone's last hand had been put to it, there would have been no room left for accusing him of not understanding the rule in Shelley's case."

The author was by no means satisfied with this last note of explanation; and, at first, was somewhat disposed to reply to the several topics it touched upon. But he soon convinced himself of its being high time to deliver both the Lord Chancellor and himself from discussions, to which there had already become attached as much sharpness, as could well be made consistent with due politeness, or with the avoidance of an absolute breach on either side.

Such are some of the mortifications to which all who venture on print must expect to find themselves occasionally exposed. But, if dismayed for a time by unjust censure, the author was soon afterwards cheered from another quarter with the language of graceful compliment and praise. Having sent a copy of his Law Tracts to Lord Camden, and afterwards some valuable memoranda upon the points of law relating to the Regency, without eliciting even notice, Mr. Hargrave wrote a rather sharp request for the return of his papers, when the venerable peer made the *amende honorable* in the following elegant apology for his unintentional omission.

"Sir,—I don't know whether you will excuse me or not, but I cannot excuse myself, for having so long neglected to send home the extracts you furnished me with so obligingly at the time the parliament were settling the regency. They were of great use to me at that time, and I beg you will accept my thanks for communicating to me so much material learning upon that subject. I must not

omit at the same time my thanks, which ought indeed to have been given long since, for a valuable present I received from you of some excellent Law Tracts. These acknowledgments for civilities, if they are by accident omitted at the time, are too apt to be forgot. I am afraid I am too negligent in this duty, owing I believe to a natural carelessness, and somewhat to the variety of business, which puts out of my head oftentimes matters of less moment, but equally fit to be remembered. But they never proceed from want of respect, which, to yourself, whom I have long esteemed for your learning, though I have not long had the pleasure of your acquaintance, has never been wanting.

"I am ashamed to say, that having totally laid aside all law reading for many years, I never did even open the book you presented me with till I received your letter two or three days ago. Upon looking into it, I found it full of excellent matter, containing, amongst other things, a treatise of my Lord Hale, de Jure Maris, which I remember to have read in my younger days from a copy lent me by Mr. Harding's father. I was at the same time not a little surprised to find there an argument of my own, upon the right of the King's Bench to issue a Latitat into Wales. This little tract has been out of my possession for a great many years, having been lost or stolen out of my study. The occasion of writing it was this. At the time this question came before the Court the exchequer attorneys were very much alarmed at the attempt, as that business had always been confined to their Court. I was then acquainted with one of those gentlemen, of the name of Lloyd, and as I had taken a note of the argument in Lampley and Thomas, I took occasion to converse with him upon the subject; and, at his request, having at that time no business, I took it into my head to examine the books and arguments, and to set down my thoughts upon it in the manner you see. I thought, too, that this gratuitous diligence might recommend me to the notice of those gentlemen who were so much interested in the question. And it did so far succeed, that some time after, that cause of Lampley and Thomas, having either by abatement, or some other reason, been put an end to, the point was brought again before the Court in the case of Jones v. Jones, and I was then employed to argue the plea, and we prevailed. Upon that occasion I was obliged to new model my former treatise, and contract the matter of it into a Court argument. But I preserved the original, and it is very possible that the manuscript you had from the bookseller is that very manuscript I lost; I should therefore esteem it a favour if you would let me look at it, not to reclaim it, but to gratify my curiosity. You have thought it worthy

of a place in your collection, which is more flattering to me than ten times the value of such a trifle.—I am, sir, with real respect, your most obedient faithful servant,

"CAMDEN."

"Hill Street, May 14, 1789."

The Regency Question formed, unhappily for Mr. Hargrave, the cardinal point of his fortunes. During the heat of the argument, he had furnished Mr. Pitt, through the medium of Sir Archibald Macdonald, then Attorney-General, with an extract from Lord Hardwicke's manuscript, in which it was contended that the Prince of Wales had no more right to the crown than himself. So far the learned satellite of the Treasury and his imperious superior agreed in opinion. But, not content with this private information, Mr. Hargrave must flutter in a pamphlet, and published Brief Reflections on the Regency Question. This proved his ruin. When Mr. Pitt proposed resolutions in the House of Commons restrictive of the powers of the Regent, an independent country gentleman, Sir John Aubrey, cited the authority of his own official lawyer against him, that they could not pass such resolutions during the incapacity of the King. "There are three estates of the realm, but only two are now met, the first of the three being absent. Till this branch shall appear, I agree with the sentiments contained in a very recent publication, by one whose authority as a well read and consummate lawyer is so justly and universally acknowledged, and with whom I have the honour to be connected by friendship, that, without the King, we are only a convention. But in the present case there is no necessity for resorting to a mere convention of the two Houses. The King's person may be constitutionally supplied by a commissioner; and that representative in the present extraordinary situation will, in point of propriety, be the heir-apparent to the Crown."

The genius of Pitt triumphed; and, in the tyranny of renewed power, the vindictive premier swept away all who had opposed his plans with the severity of a proscription. The publication of Hargrave had to his eye the appearance of crime, and he punished it as an act of mutiny. Finding or making a pretext, the secretary to the Treasury, Steele, sent the rash lawyer a curt dismissal, without assigning any cause.

His avowed principles and known connexion with the Whigs left him utterly defenceless. The peer who gave him the situation was in active opposition, and even his patron, Lord Thurlow, had caballed for the overthrow of the prime minister. From the Chancellor, who lingered in place but without confidence somewhat longer, Mr. Hargrave received in reply to his vehement remonstrances the following unsatisfactory explanation:—

"Scarborough, Sept. 3, 1789.

"Dear Sir,—I am exceedingly sorry for the accident, whatever it be, by which you are removed from an office which could not be more agreeable to you than you might have been useful to the public. If it was mere caprice, I am also sorry that it was thought expedient to add insult to injury by the dryness used upon the occasion, and indeed I am surprised at it, for Steele is certainly a sensible, honest, and well-natured man. If the business of the Treasury has been done lately with less skill and accuracy than might have been expected—I have been told that, by some means or other, it has happened—you had no share in that, in which case I should think that would have been a better reason for employing than dismissing a man of talents. I shall not easily be brought to consider this as a tacit manner of insinuating that blame which could not be directly imputed. On the other hand, you had great merit with government, by a seasonable publication of those grounds and principles, which afforded such effectual assistance in a moment of much more importance to this country than the fate of twenty ministers. Though I have no access to know how this happened, yet you have other friends who can easily procure such information, and I dare say Mr. Hardinge will readily take any part which will be agreeable to you. I am, dear sir, with great regard, your most faithful and obedient servant, "THURLOW."

Mr. Hargrave having learned from other sources still more explicitly the real reasons for his abrupt dismissal, thus communicates them to an intimate friend:—

"Having been removed by Mr. Pitt from my official situation without any previous complaint or cause assigned, I was left to my own conjectures as to the grounds of so harsh a measure. I am at length informed how it is that the minister explains his conduct to his friends. He avows that the chief cause of my removal was that skeleton of general ideas on the Regency Question, the pamphlet I published under the title of Brief Deductions. But as a subsidiary

reason he imputes to me such an official dilatoriness as rendered me useless to him. Having called to his aid this imputation, he then proceeds to state, that unwilling to hurt my fortune, he permitted me to hold my situation as a sinecure; that by accepting this tenderness I had contracted an obligation, at least not to be hostile to the administration, but that my pamphlet on the Regency was such a mark of opposition, as fully justified his resentment, and ought to have prevented my being surprised at it."

Mr. Hargrave denies the imputed dilatoriness, and argues his right to maintain his opinion.

Of Mr. Hargrave's abstract right to express his opinion there can be no question, and just as little of his imprudence in printing it. But far more deserving of blame is the want of magnanimity in the prime minister, who might surely have pardoned one fault in consideration of the author's learning, and his services to the republic of letters. The truth is, Mr. Pitt cared no more for literature than Sir Robert Walpole, and read scarcely any books but state papers or treatises on finance. The sympathy of warm friends, Jekyll, Hardinge, and Adam, could not compensate Mr. Hargrave for the loss of income, but it soothed his exasperated feelings, and was affectionately given. Nor did his Majesty's opposition neglect to comfort the martyr in their cause. Mr. Hargrave having lent Sheridan Lord Hale's manuscript, at the time of the Regency question, and applied for it afterwards in vain, that careless statesman accompanied an apology for mislaying the work with an expression of his indignant surprise at the minister's vengeance. "I do assure you that it has given me the sincerest concern that I have not yet been able to find the manuscript, which you have had the trouble to inquire about so frequently. I know that it cannot be lost. But I am most irregular about papers; and sometimes, in order to be very careful, I hide what I want to secure. The conduct of the ministry in your case is, in my opinion, the most violent and unjust act which the vindictive system since the king's recovery has produced."

The missing treasure was afterwards found in the library of Dr. Parr, to whom Sheridan had lent the work, and, *more suo*, forgotten the circumstance. The worthy pedagogue hastened to hold forth to a persecuted brother Whig the right hand of

fellowship, and presented him with a copy of a new semi-political work, "Eleutheropolis," for which Mr. Hargrave expressed his sense of obligation in the following eloquent letter:

"New Boswell Court, 18th June, 1790.

"Dear Sir,—I beg leave to acknowledge the receipt of your obliging and very agreeable present. A man must, I think, be miserably deficient in literary taste not to enjoy such a performance as a treat of a very rare kind. I have always classed you amongst the steady friends to our constitution, but, had I entertained any doubts of your political orthodoxy, those doubts must have vanished upon reading your late spirited publication. You have steered between two extremes, each of which has very beguiling attractions. For the sake of the country, I wish that you had written more professedly and more largely on the political topics which have latterly so occupied general attention. Probably you have not yet had the opportunity of examining Lord Hale's Tentamina concerning the soul. I was happy in the opportunity of making a present of that manuscript to one so peculiarly qualified to decide upon its merits, and in case of its being found worthy of its excellent author to enrich it both from the sources of his own mind and from the stores of classical antiquity. When you have perused the manuscript, I shall take it as a favour to know how you are struck with Lord Hale's manner of treating so abstruse a subject.

"You will oblige me by presenting my best compliments to Mrs. and Miss Parr. Dear Sir, with great esteem,

"I have the pleasure to be yours most faithfully,

"F. Hargrave."

How well this interchange of literary presents and friendly civilities was kept up, is shown in another letter most expressive of the writer's bland and complimentary spirit.

"New Boswell Court, 2d May, 1801.

"Dear Sir,—Your most valuable present of the Sermon on Benevolence has reached me. The subject is happily chosen. It is indeed a subject of the highest importance to the society in which we live, or rather to civilized society throughout the world; for if the hollow system of benevolence you so mightily oppose should become generally adopted, all the exquisite sensibilities which constitute the prime sources of virtue would be extinguished, and so we should become replunged in barbarism. Though hitherto I have scarce been able to reach beyond the sermon, and most of the copious notes which follow are untouched by me, yet I have had a vast gra-

tification. The sermon is sublime in the ideas, fluent, vigorous and tasteful in the language, skilful in the arrangement. I am eager to enjoy the remainder of the feast, and consider postponement in this instance as one of the great evils to which I am pinned down by professional ties, and various indescribable check-strings. As the sermon is a rare and fine specimen to what grandeur pulpit eloquence may be elevated, I expect from the notes a suitable accompaniment of profoundness of moral discussion, deduced from the choicest stores of classical antiquity. My son Francis is delighted beyond measure. He has called my attention to some rich and glowing passages of the sermon. From this time I trust that the danger of absorbing benevolence into nothingness, under the shelter of universality, will cease to exist.

"My best wishes attend you and yours. Francis joins his best respects. For some time past Mrs. Hargrave, though not confined to the house, has been in a sad state of health; and though she is better, I am not without alarm. She would add her remembrance if she knew I was writing.—Dear Sir, with sincere respect and regard, I remain your obliged and faithful servant,

"F. HARGRAVE."

The friendship of Dr. Parr did not evaporate in words. No sooner had Mr. Fox been restored to power than he wrote an importunate letter to Mr. Fitzgerald, his private secretary, urging the professional claims of Hargrave upon the notice of ministers, and at his pressing instance, as well as from a sense of justice, Mr. Hargrave received the tardy tribute at the hands of the new Chancellor of a silk gown, which comprehended, much to his social enjoyment, the rank of bencher of Lincoln's Inn. Better preferment was in store for the slowly promoted lawyer: that mastership in Chancery, to which his fond wishes had long secretly pointed, and for attaining which we cannot but regret that politics should have been deemed to interpose an insuperable barrier, had been promised, when the Whig ministry suddenly dissolved, and his last hopes sunk with them. He had not been totally without notice or reward, though inadequately requited. In 1791, Chief Justice Eyre offered him the coif, but on his soliciting the further appointment of king's serjeant, compliance was declined, lest it should be construed into an affront on the older practitioners in the Common Pleas. Some time afterwards the corporation of Liverpool, with a discernment that did them honour, offered

him the place of recorder. Lord Brougham once amused the House of Commons with an anecdote illustrating the delight which Hargrave took in this new dignity.

"Mr. Hargrave had been appointed recorder of Liverpool, and was so pleased with the appointment, and with the manner in which he had been received in the discharge of his official functions by the good people of that town, that on his return he could never cease talking of them, and always in a strain of the highest eulogy. 'The magistrates,' Mr. Hargrave would say, 'oh! they are the kindest, the most humane, and most considerate set of men I ever had the pleasure of meeting. They all seem delighted at every opportunity of making themselves useful. The attornies who practise there are a most upright and deserving set of gentlemen. They are worthy of a much higher rank, and better fate, and would do honour to the wig and gown in any part of the country. Then the juries are so kind, and attentive, and obliging, and the suitors who proceed in that court, they are so civil and so candid, so grateful for the smallest portion of justice, that it is really a satisfaction to administer it to them.' 'And the criminals,' said a gentleman, who was listening to this laudatory statement. 'Ah, the poor criminals,' continued the recorder, 'why really for poor fellows in their situation, they were the best and worthiest set of men I ever met.'"

We could have laughed the more heartily at this anecdote of good humoured simplicity, had the heart from which it flowed wantoned still oftener in the sunshine of happiness. It was the *naive* and natural exuberance of grateful feeling—the gushing forth of a kindly and wounded spirit, long unused to attention, and extravagant in its ebullitions of gratitude. For his was in truth, after the fiat of dismissal from his office under the Treasury, a crushed and broken spirit. Infinitely beyond the immediate effect on his fortune, disastrous as it undoubtedly was, appears to have been its sinister influence on his tone of mind and temperament. Naturally anxious and apprehensive of evil, he seems after this reverse to have cherished that settled despondency which anticipates and almost invites misfortune. Always of an humble disposition, and apt, at least in speech, to undervalue his own acquirements, he would appear to have been humiliated in his own sight by this

act of oppressive power, and to have shrunk far more than a man of firmer nerves would, or ought to have done, beneath authority. Brooding over his disappointment, he imbibed the conviction that he was a proscribed man, and vented his complaints so openly as to be believed, much to the disadvantage of his fortunes. Of this a remarkable instance has been furnished by himself in a case relating to the Duke of Athol, in which the conduct of his grace, in ministering to what he must have mistakingly thought the miserable vengeance of Pitt, was any thing but ducal or gentlemanly. Mr. Hargrave had been consulted as to the validity of the duke's claims on government for further compensation for surrendering the sovereignty of the Isle of Man, and had given a decisive opinion in his favour. A further consultation was desired with another counsel, the nature and consequences of which are best told in the lawyer's interesting narrative.

"The duke was present. The author perceived that some sort of opening of the business was expected from him; and that a pause took place to give the opportunity. His mind was then fully possessed of the case, and, though from a sense of his want of the essential facilities, ever averse to risquing himself in unprepared oration, and though almost immediately before the meeting he had hinted to the solicitor in the business enough to guard against the expecting any thing of the kind, the author suddenly found himself subdued by the impulse of professional zeal into an effort quite beyond the sphere both of his habits and of his powers. Once committed he could not well retreat, and so his effusions gradually became expanded into a regular speech, occupying a space of time such as might be supposed to belong to an opening of the case to the proper forum for such a cause. Throughout he was sensible of its imperfections.

"But a freezing coldness was not amongst its faults, and it was chiefly addressed to a brother counsel of that generous cast of mind which ensured the utmost stretch of favourable reception to a warm and sincere attempt at impressing just conceptions of an important case on those newly introduced to it, and which scorns appropriating to himself what belongs to another. It is not wonderful that such a person should be moved into instantly avowing that, for the sake of the cause, he wished the author's consultation speech had been delivered at the bar of the House of Commons. The duke himself was so far struck at the moment that he pointedly ad-

dressed himself to the author. What in effect came from his grace was, that, though he was not a man of words, he could not pass over this new effort in the cause of him and his family with entire silence, and that he should consider both himself and them as bound to the author by gratitude.

"The result of the consultation was an understanding that the proceeding for relief should be by petition to the House of Commons. Within a short time, however, Mr. Hargrave found that some how or other a new course of proceeding was adopted; that a petition to the king in council, instead of one to the House of Commons, was resolved upon, and that in this new course his grace's other counsel were resorted to with an entire omission of the author. He did not know particulars; for, no explanation being given to him, he was left to his conjectures at being thus left out of the business. But he was not quite blind to the probable cause, and whatever it might be, he thought himself justified in proceeding no further with the argumentative opinion till he should understand upon what footing he stood in the business. With this suspense over him he was suffered to continue for five or six weeks. But at length the time for explanation arrived. He had notice that the duke would himself call to give the explanation. The duke called upon the author accordingly. It was on the 15th June. The explanation was given. As the author understood the duke, it amounted to this:—that the petition the author had settled had been altered into a petition to the king in council, and had been presented; that an early day was fixed for hearing before the Committee of the Lords of the Privy Council—that the potent minister who had recently resigned had assisted in so altering the petition that a case for the privy council board had been printed—that the business was in the hands of him the then late minister, and he the duke could not act as he could wish towards the author, lest the interests of his grace's family should suffer—that the duke considered himself and family as greatly obliged to the author, and still reposed the chief confidence in him; and that his grace should consult the author in any relief bill which should be brought in, and in every thing relative to the business after its having been disposed of by the king in council. Upon this explanation just enough passed from the author to show that he was not likely in his professional character to accept the continuance even of ducal confidence on such terms. He is ever anxious to be strictly observant of politeness. But the politeness he looks to is what never excludes sincerity, and in this peculiar delicacy of situation he chiefly left it to be inferred from his manner and countenance, what were the na-

ture and extent of his dissatisfaction. The next day, the Duke's printed case for the Committee of Privy Council was sent to the author. It was signed by three counsel for the Duke, and two were the author's juniors at the bar. Here the author's connection with the Isle of Man case became quite terminated."

At this interview between the Duke and his counsel, told with so much simplicity, his Grace of Athol must have stood rebuked before the man of honour, but his conduct proves how much the most exalted in rank will sometimes truckle to authority. But though the brand of disfavour with an all powerful minister was marked in Hargrave so plainly as to scare pusillanimous courtiers from resorting to his chambers, he could yet, by the strength of his legal reputation, command the retainers of many independent clients, and continued to be engaged in several matters of grave moment and deep interest.

In 1791 Mr. Hargrave was employed to draw the Roman Catholic Relief Bill, which passed into a law. He evinced excessive sensitiveness to the remarks of Lord Thurlow with respect to the drawing. "It is an easy thing," he writes to Lord Petre, "to animadvert upon the drawer or settler of a parliamentary bill. But it is not quite so easy to be sure whether any part of the blame imputed belongs to him. Throughout the business I did not act as a merely professional person, but from the beginning was as anxious to see the country relieved from a monstrous complication of intolerant laws as if I had been of that religious persuasion, against the members of which they were directed."

In 1794 Mr. Hargrave argued with deep personal feeling the claim of Mr. Myddleton to be freed from a harsh trust deed, into which he had been betrayed by inadvertence. In order to extricate himself from temporary embarrassments he had parted with all power over his large estates. As no fraud could be imputed to the trust deed (one of the trustees was Lord Kenyon), the attempt failed, but some of the passages in Hargrave's animated appeal possess much pathetic interest from their embodying the personal feelings of the speaker.

"The maxim of 'post nummos virtus' is indeed too prevalent. I fear that the influence of this maxim is too often the cause of rewarding pretensions merely nominal, merely proud and ostenta-

tious. I fear that excluding humble merit from all share of notice, where money has been wanting, has been latterly too fashionable. I fear that recently there has occurred a case, in which an individual, profound in legal learning, profound in general science, polished in manners, innocent in life (the speaker alludes to Mr. Fearne), perished under the baneful influence of this maxim of passing over merit, where money is wanting to give it currency. But you, my lord, are too dignified to surrender yourself to such maxims. No, my lord, you feel that excess of expenditure may be error, but that avarice must be sin!

"In some way or other, and at all events, I trust that this cause will be disposed of, so as to do ample justice to the father, without either wounding the feelings, or injuring the interests of any of the persons concerned in it; that the father will be emancipated from a state of degradation and dependence; that the son will be more than compensated for the effect from relief of the father; and that the prosperity, harmony, and happiness of the whole Myddleton family, will be renovated. Should this be the result, the master of Chirk Castle will be able to say, 'Myddleton's himself again!' And should such be the event, I trust that none will object to once more greeting old Mr. Myddleton as Thane of Chirk and Ruthyn. In that event, also, I trust that I shall be considered as having discharged my duty to the plaintiff, without intention of offence to any, and farther, without any hurt to any other person whatever, nearly equal to that which I myself feel, from having been forced by professional duty to adopt an asperity which is as great a stranger to my nature, as success and prosperity have been to my fortune. By fortune, I mean, as your lordship may easily believe, not property, but that contingency of human affairs which is so propitious to some, but which may become adverse to the most opulent and the most elevated. Here, my lord, I conclude, with the disposal of this case, so far as justice is concerned. But now I have performed all that my feebleness will allow me to perform for old Mr. Myddleton as plaintiff, permit me to follow my long address to your lordship's feelings of justice, with a short one to your feelings of estimation. Your patience has already borne with my long and painful struggles for his fortune. I am sure that your humanity will listen to a few words from me for his character. I suspect that there is a current error about old Mr. Myddleton. I suspect, that because he has been in great embarrassment, he is supposed to have been great in dissipation. But if there be such a notion prevailing, the information I have received makes it incumbent upon me thus publicly to declare my belief that there is not a colour for so con-

sidering him. His embarrassments are perfectly consistent with understanding, and an innocent life. Somewhat of unskilfulness—somewhat of indolence in the management of his affairs, must be confessed. But he never distressed his affairs by vicious pursuits—those pursuits with which persons of his condition in society are in these times so disgracefully prevalent. He may say to those who so kindly reproach him for extravagance, as Timon said to his frightened steward Flavellus,—

> " 'Come, sermon me no farther,
> No villanous bounty has yet past my heart;
> Unwisely, not ignobly, have I given.' "

The most important cause in which Mr. Hargrave ever embarked his learning and sympathies, was a vigorous but unsuccessful attempt to set aside Mr. Thellusson's cruel will. From his own report of one of the most important causes that ever engaged the attention of a Court of Chancery, and the admirable Treatise by Mr. Hargrave's son on the act which passed in consequence (the Thellusson Act), the following summary has been taken.

Mr. Thellusson, a native of Geneva, having come at a very early period of his life to England, with a fortune of about £10,000, settled in London as a merchant, and enjoyed a course of commercial success almost unexampled. In the sixty-first year of his age, being at the time in perfect health and legal sanity, he made and executed his last will and testament, bearing date April 2, 1796, and thereby disposed of his property upon trust from time to time, during the natural lives of his three sons, and of the sons of each of his said sons, then in being, or thereafter to be born to any of his said sons; and of any such issue as any of his grandsons might have as should be living at the time of his decease, or born in due time afterwards, and during the natural lives of the survivors or survivor of the said several persons, to collect and receive the rents;—that upon the decease of the last survivor all the accumulated estates should be divided into three lots of equal value, and settled on the eldest male lineal descendant then living of each of his three sons; and if there should be a failure of male descendants of two of his three sons, the sole male lineal descendant of the testator should become entitled to the whole three lots, consolidated into one huge mass of

landed property, which it was said would probably exceed "the largest territorial private fortune then known in Europe." Shortly after executing this extraordinary will, Mr. Thellusson died, on the 21st of July, 1797. Mr. Morgan, the actuary, calculated that the accumulation ought not to be taken at much, if at all, below eighty years. The net value of Mr. Thellusson's residuary property at the date of his decease was estimated at above 600,000*l.*; taking it, however, at the lowest value, and assuming it to be improvable only at the rate of 5*l.* per cent. per annum (though money at that period was capable of being improved at a much higher rate), it would in seventy-five years amount to 23,299,611*l.* Immediately after Mr. Thellusson's death, a bill was filed in the Court of Chancery by his widow and children against the acting trustees and executors of the will, and other necessary parties, praying to have the said trusts declared void. A cross bill was filed by the acting trustees, praying that the trusts might be established. Both causes came on for hearing on the 5th December, 1798, before Lord Chancellor Loughborough, assisted by the Master of the Rolls, Sir Richard Pepper Arden (afterwards Lord Alvanley), Mr. Justice Buller, and Mr. Justice Lawrence, and the arguments of counsel lasted several days. The amount of property whose ownership was at stake, the public importance of the will as a precedent, and the singular novelty of its dispositions, having compelled each party to obtain the assistance of the greatest professional ability of the day. Every part of the law affecting the validity of the will, and the legal character, construction, and operation of the trusts thereby created, was explored and ransacked, more especially by the counsel who attacked its validity. They disputed the validity of the will principally upon the following grounds: first, that the trusts created therein, being limited by way of executory devise, ought to have been for such purposes only as had induced the courts originally and successively to recognize such trusts—namely, for the benefit, not for the disherison, of the family of the creator of the trust: secondly, that this executory devise was limited in words, which in six distinct particulars exceeded the limits of the rule against perpetuities, and therefore ought to be declared void in its creation; and lastly, it was contended that the beneficial interests in the

accumulated estates were devised and settled by the testator in language so vague and obscure, that they ought to be declared void for uncertainty. These, and many other subsidiary arguments were, with consummate learning and ability, pressed upon the consideration of the judges at every stage of the long protracted attempt to overturn this celebrated will, with the hope of effecting the distribution of the testator's wealth among his family, according to the just and equitable rules of the law of intestacy; but unfortunately without success. On the 20th of April, 1799, the above-named eminent judges and his honour the Master of the Rolls successively delivered their opinions in favour of the validity of the limitations, and the Lord Chancellor decreed that the will ought to be established, and the trusts thereof performed.

Considering Mr. Thellusson's trust simply with regard to its legal validity, the first question on which the Court was required to decide was, whether on a fair construction of the whole instrument, the testator had intended that the beneficial ownership of the corpus of his property, or of the intermediate rents and profits thereof until the period of accumulation expired, should under any circumstances or by any possibility be in suspense beyond the then legal period. This question was unavoidably decided in favour of the limitations, for the duration of the trust evidently extended only until the death of the survivor of nine persons, all of whom were in esse at the death of the testator; who had thus stopped considerably short of the full legal period, until which he might, by means of an executory devise of the corpus of his property, have suspended its alienation, and by means of a commensurate trust for accumulation, have prevented the enjoyment of its intermediate rents and profits. The limitation being thus recognised by the Court, as not involving an infringement of the rule against perpetuities, a second question arose, peculiarly the subject of consideration in a Court of Equity, namely, was a testator, being manifestly guilty of undiscriminating and causeless disherison of numerous living descendants, entitled to clothe the officers of the Court of Chancery with the execution of "an eccentric, unmeritorious, and politically mischievous trust?" and were the trustees entitled to the protection and assistance of the Court of Chancery, precisely as if the object of the

trust had been honourable to the testator, beneficial to his family, and useful to society? In order to induce the Court to overturn the will on this ground, we find Mr. Hargrave entering upon a profound and luminous investigation into the origin of executory devise, the gradual settlement of its limits, and the principles of law by which it is regulated; and in the most convincing manner pointing out the direct infringement of those principles, and the flagrant violation of the spirit and intention of every part of the law of testamentary alienation involved in the recognition and execution of Mr. Thellusson's trust. But it must be admitted, on the other hand, that although the testator had abused the right of alienation, and had violated the spirit and intention of the law of executory devise, in the creation of a trust of the most iniquitous character, in short, although Mr. Thellusson's will merited every epithet indignantly applied to it in the argument of the learned and enthusiastic counsel for his family, and although injustice, absurdity, eccentricity, ambition, avarice, and heartlessness, had all combined in the creation of this testamentary trust, yet the law would not have been justified in annulling Mr. Thellusson's will, nor equity in declining to execute his trust. Every Court before which this cause was successively taken concurred in disclaiming any such power! In Mr. Thellusson's will, although the purposes to which the accumulations were to be applied were more selfish and inequitable than could be easily conceived, no technical error or fatal ambiguity was to be found. Unfortunately not one crevice could be detected in this project of inordinate ambition, vanity, and avarice, through which the law might enter and overturn the fabric from its foundation. As the discretionary, or rather legislative, authority over executory devises, which had been claimed by Lord Nottingham, was disclaimed by Lord Loughborough and (not without reluctance) by the House of Lords also, the will was established, the trust recognised, and the trustees declared entitled to the assistance and protection of the Court of Chancery. And yet, when Mr. Thellusson's will was considered, even by apathetic lawyers, their unanimous judgment concurred that there had never appeared before the English judicature any instrument embodying a more monstrous abuse of the right of alienation, a more

unreasonable and inconvenient executory devise, or so glaring and odious a desecration of the fiduciary office. The great object of the testator's ambition was not to be satisfied with so paltry a family estate as 600,000*l.* The accumulations of his own life were sufficient in his opinion for the foundations only of his design. A proud and lofty superstructure was intended to be reared from the proceeds of a long continued system of accumulation—in fact by a prolongation of his own industry and economy for many years after his decease through the agency of several generations of trustees. Theoretically the institution of a trust would accomplish the testator's project; but the experience of its operation, during above thirty years, proves it to be practically a complete failure. This has arisen from two causes—first, the costs of litigation; secondly, the expenses of management. The expenses of management from January, 1816, to 1833, exceeded 122,700*l.* The only increase in respect of income was 8,356*l.*, and an accumulation of capital of 326,364*l.*

The vast fabric of posthumous avarice will thus never arise, like an exhalation to crown the fantastic visions of its founder; and who can regret the failure? Of Mr. Hargrave's earnest, impassioned protest against this wicked devise being legalised, a very full report is given by himself in the Jurisconsult Exercitations, an excellent and voluminous work, of unfortunate title; but as the reader can scarcely be expected to possess a copy, the following may suffice as a short specimen of the pleader's exertions:—

"Thus, as I see the present case, after a long and anxious study, it involves not only the valuable interests of the family on whose behalf I have argued, but the credit of the law of England. If it is adjudged against the will, at the same time the Thellusson family shall be relieved from the effect of an unnatural testamentary disposition, the law of England and the Courts of Westminster Hall will be safe from all imputation of improperly enduring executory devises and trusts of the same nature. The victory over the will of the late Mr. Thellusson will be gained for English jurisprudence even in a greater degree than for the Thellusson family. Notwithstanding the immense deprivations to the family of the late Mr. Thellusson from his absorbing and selfish trust of accumulation, they are so far happily situate as to be able to bear the injury under which in that event they must submit to suffer. But should your

lordship, in your character of first judge of English equity, find yourself under an invincible necessity of enforcing such a will, I am at a loss to conceive how English law and English judicature can escape at least the liability to reproach, for being ancillary to posthumous avarice, at the risk of gradually merging all the property of the kingdom in mere trusteeship, and of so gradually depriving the people of England of all beneficial enjoyment.

"Therefore against a decree confirming the late Mr. Thellusson's proscriptive will, I deprecate to your lordship, not merely on behalf of the interests of the Thellusson family, but on the behalf also of the character of the law of England, and which I fear will be highly degraded, if the will of Mr. Thellusson shall be suffered to prevail —and I deprecate to your lordship, on behalf of the characters of those venerable judges, by whom the law of executory devise, and the law of trust of accumulation, were under an exercise of judicial discretion founded for general utility, and whose fame is thereby become responsible for the consequences—and I also deprecate to your lordship, on behalf of the people of England, whose most essential interests may be deeply wounded, should executory devise and trust of accumulation be suffered to degenerate into public mischiefs.

"If your lordship shall annul the monstrous executory devise and the monstrous trust of accumulation, against a decree for which I thus solemnly deprecate, you will prove that a great mind is above prejudices, however seducing, and however generally prevalent; and you will, I am persuaded, entitle yourself to the thanks of the people of England."

In addition to being retained in causes of importance in Chancery, Mr. Hargrave was consulted as chamber counsel on several grave constitutional questions. Two Irish peers, being committed for a contempt in publishing what their brother peers adjudged to be a libel, consulted this great lawyer upon the possibility of redress, and his indecisive, almost hesitating, judgment shows the magnitude of the doubts which surrounded their inquiry.

"Proceedings in either House of Parliament for contempt and breach of privilege, more especially where, as in the present case, the charge is for a libel, are in their nature very contrarient to the ordinary rules and course of administering justice in England. The offending parties act as judges. The Court is not an open one. The witnesses against the accused

party are generally examined in his absence. The accused party is called upon to defend himself without the opportunity of cross-examining the witnesses against him. He is not in general allowed to have the benefit of counsel. He is in some degree interrogated against himself. He loses the benefit of trial by jury; and if the imputation is for a contempt against the House of Lords, and the accused is a commoner, he is tried not by persons of his own order, but by those of a distinct and a higher one. The judgment is said to be not only unappealable, but wholly unexaminable, except by those who pronounce it. But if the contempt be for publishing a libel, there is a still further hardship; for in the first instance, and before hearing of the accused party, it is sometimes adjudged that the offence has been committed, and so it is only left to the accused to controvert his having committed it. This seems a very severe deviation from the common course of criminal justice." While Mr. Hargrave enumerates the variety of hardships, he will not declare an opinion that the practice is an excess of constitutional power. "What is the boundary of the jurisdiction of Lords or Commons as to privilege and contempt, and how that jurisdiction, where it really exists, is exerciseable, very much depends on the law and custom of Parliament. Of this law and that custom the judges have sometimes declined to be the interpreters, even when called on by the Lords, with whom they are assessors."

This learned commentator, having published, in 1797, a most elaborate work, "Judicial Arguments," full of matter for the lawyer and scholar, but containing figures of false rhetoric, and deformed by a tone of unmanly querulousness, was severely taken to task by the Critical Review. The critic ridicules his false modesty where he says, "It is for inferior workmen such as himself to dig the clay, and to embody it. To light the Promethean torch and to infuse soul into composition belongs to those of a far higher order;" and condemns his Jeremiad of "being immured in a bark almost shivered by adversities." How deeply these animadversions sunk into his morbidly sensitive mind is shown in his written confession to a friend.

"The critic first quarrels with my occasional adverting to the

crossness of circumstances, under which I wrote the preface to Lord Hale. Perhaps it would have been wiser, or at least more prudent, to have suppressed all those strong feelings, under which I found myself so interrupted, and so checked, and curtailed. But on such a topic of human infirmity, a generous mind would have postponed to animadvert, till the rays of prosperity had begun to cheer the individual so open to attack. Nor would a scrupulously delicate critic have ventured to apply harsh rebuke in such a case, without knowing the nature and extent of the difficulties and misfortunes alluded to. Indeed, during the whole time of writing the preface, I had a complication of pressures to struggle with. I had recently lost a lovely and favourite daughter, and I was daily witnessing the unmanageableness of the mother's grief. I had also recently suffered the pangs of separation from my eldest son, on his departure for Madras, and I saw Mrs. Hargrave equally suffering on the occasion. Besides this, there was an accumulation of disasters in other respects, from painful circumstances too delicate to bear epistolary explanation. The result of the whole was, that while I was writing the preface, I was at the same time almost a victim to private griefs and difficulties, and a slave to professional business, which, however inadequate in its profits, was very various, very cumbersome, and frequently very arduous; and that under the aggregate pressures upon me, I was forced to be incessantly guarding Mrs. Hargrave against the excess of despondency, and against the consequences of too minute an attention to the difficulties I had to encounter, and to the danger from them to her and myself and our remaining children, and my deceased brother's three daughters, whose dependence for about thirty years past has been wholly upon my exertions. This general statement is surely enough to excuse the infirmity which the harshness of criticism has thus taken advantage of."

This letter forms assuredly an affecting apology for his weakness, if not a justification. But the period approached when the weary labourer was to be at rest. For eleven years he was assiduously engaged in erecting the last and greatest monument to his fame, the edition of Coke on Littleton, which declining health compelled him to leave incomplete. Of the manner in which he had performed his task, Mr. Charles Butler, who completed the work, has said (and there could be no better witness), "His annotations exhibit the most profound and extensive learning, and the finest dis-

crimination. In the law of property and many other branches of English jurisprudence, he was eminently learned; in the law of dignities, the prerogative of the crown, and the history and principles of the constitution, he scarcely had an equal. His rare acquirements were more than once displayed by him, in a manner highly honourable to himself, and serviceable to his country."

In the early part of the year 1813, from a too intense application to this magnum opus, this labour of love, Mr. Hargrave became afflicted with occasional alienations of mind, which, although they were at that time neither frequent nor violent, were exceedingly distressing to his family. A consultation of physicians was held, at which Sir Henry Halford presided, when it was recommended as absolutely indispensable, that Mr. Hargrave should, as a first step, immediately retire from his profession. These suggestions were strictly attended to; and owing to the skill and unremitting care of his medical advisers, his family saw him once more restored to the use of his mental faculties, and his bodily health materially improved. Symptoms of relapse occasionally occurred, but were never sufficiently alarming to require any assistance or control beyond that of his own family. As Mr. Hargrave had not been able to lay up any provision for sickness or old age, his family and himself might have suffered privations, but for the generous interposition of a friend, the late Mr. Whitbread. By his advice and promised aid a petition was presented to the House of Commons from Mrs. Hargrave, stating, "That Francis Hargrave is possessed of divers books and manuscripts, collected with great labour, and at a considerable expense, during the course of a long professional life; which books and manuscripts would form a valuable addition to the national collection, having been selected with the greatest skill and judgment; and that owing to the afflicting illness of the said Francis Hargrave he is no longer able to follow his professional pursuits, whereby his family is in danger of being exposed to great difficulties, and praying the House that the circumstances of the case may be taken into its kind and liberal consideration, and that the acquisition of the said books and manuscripts may be made for the public

upon such terms, and for such consideration, as to the House shall seem meet."

Mr. Whitbread said, it was unnecessary to say much respecting the merits of Mr. Hargrave. His profound learning and extensive information were well known to most of the members of the House; and no one, he was convinced, would be more ready than his honourable and learned friend (Sir S. Romily), to bear testimony to the great value of Mr. Hargrave's writings.—(Hear, hear, from Sir S. Romily and others.) By those writings, and by the publication of several valuable manuscripts, Mr. Hargrave had rendered great service to the public in the advancement of legal and constitutional knowledge. He was now unhappily prevented by illness from attending to his professional pursuits, and it became necessary, as a provision for his family, to dispose of his library, consisting of a large and valuable stock of books and manuscripts, collected by him with very great skill and judgment during the course of a long professional life. The acquisition of such a library would undoubtedly be of great advantage to the public, and it would be proper that some reward should be conferred by the legislature upon Mr. Hargrave. Mr. Whitbread trusted, therefore, that the object of the petition would meet with the unanimous concurrence of the House.—(Hear, hear).

The Chancellor of the Exchequer seconded the motion. He fully concurred in what had been said by the honourable gentleman, and acquainted the House, that his royal highness the Prince Regent, having been informed of the contents of the petition, recommended it to the consideration of the House.

The petition being referred to a committee, Mr. Whitbread, a few weeks later, in June, 1813, stated that they had met, and examined witnesses respecting the nature and value of the books and manuscripts of Mr. Hargrave. Many of his books were enriched with notes, which were extremely valuable in the opinion of the most competent judges, and it was conceived that the books and manuscripts would be a great acquisition to the public if deposited in the Library of Lincoln's Inn. It was unnecessary for him to say anything respecting Mr. Hargrave's learning and character. There was not a

lawyer in England who would not be ready to bear testimony to his great erudition, abilities, and industry. The honourable gentleman concluded his speech, by quoting from a recent learned publication (Maddock's Life of Lord Somers, p. 142), a passage concerning Mr. Hargrave, which was quite congenial with his own sentiments:—"See what Mr. Hargrave says, in his interesting and learned preface to Sir Matthew Hale's work on Judicature in Parliament, p. 14. I quote that preface with additional pleasure, since it affords me an opportunity of expressing my admiration of Mr. Hargrave. When I reflect upon his profound learning, his useful, his infinite labours, his gentle manners, his pure, disinterested, and patriotic mind, he seems to me to rank amongst the greatest benefactors of his country." Mr. Whitbread concluded with moving, "That an humble address be presented to his royal highness the Prince Regent, that he will be graciously pleased to give directions, that the sum of 8,000*l.* be issued out of his Majesty's Civil List revenues, to be applied towards the purchase of the books and manuscripts of Francis Hargrave, Esq., one of his Majesty's counsel in the law, for the public use, and to assure his Royal Highness that this House will make good the same."

Mr. Rose expressed his hearty approbation of the motion, and his persuasion that every one who knew Mr. Hargrave would concur in it. The motion was then unanimously agreed to. We have transcribed the whole proceedings, because they appear to us to confer honour on the legislature, generally too parsimonious of its rewards to literary merit. Weighed in a bookseller's balance, the volumes might seem to be dearly bought; but the numerous marginal notes and references (for example, Prynne's Works in the British Museum), stamp additional value on the collection. Even if there should be some excess, the House of Commons did well to deal liberally with a servant of the public of fifty years standing.

In that extreme age, "when the grasshopper is a burden," he would lament the loss of his library, as the absence of an old and cherished friend, though grateful for the comforts which the purchase had procured for him.

From this period to his death he resided with his family at Chelsea. His mind was generally tranquil, and with the aid of a few books, papers, and select friends, he wore away the last years of life in a state of comparative happiness.

The following letter (his last letter) to Dr. Parr, is a pleasing proof of his calmness and resignation :—

"York Place, Queen's Elm, Brompton, June 2, 1819.

"My dear Friend,—Your late energetic and impressive letter to me in favour of Dr. Edward Maltby, for the Lincoln's Inn preachership, was forwarded to me by my dear son, and your grateful pupil, Francis, without a moment's delay. Its contents are invaluable to me and mine. The next day I met Francis, at the house of my dear daughter, Mrs. Curtis. I instantly, in her presence, authorised Francis to assure you, that your recommendation was imperative to me. My dear daughter was present. They were both delighted with my explanations on the occasion. I am persuaded that they never had a doubt of the continuance of my attachment to you, in regard, in esteem, in admiration. Their only fear was, lest the ardency of your pathetic eloquence should be too severe a trial of my best sensibilities; but I so repressed the exuberance of my mind as effectually to relieve them from all apprehensions of a painful kind. Both Francis and my daughter are active in giving proofs of their filial affection. What also most materially adds to my pleasure in this respect is, that they look to you with a reverential attachment, and are replete with gratitude for your kind partialities towards them. I am not at present equal to expatiating on subjects so very near my heart; but I cannot refrain from assuring you, that I receive the generous exuberance of your praise with pride and gratitude, and that the sacerdotal blessing with which your letter concludes, operates on me as the most consolatory requiem possible to be administered to a departing spirit, on the point of its return, with humbleness to await its further destination from the will and mercy of the supreme Author and Governor of every thing terrestrial. I must add, also, that on behalf of my dear Mrs. Hargrave, as well as on behalf of myself, I most feelingly entreat your acceptance of our warmest thanks. With all this and much more, my dear friend, I remain ever yours, most gratefully, faithfully, and truly.—F. Hargrave."

In the latter part of 1820, Mr. Hargrave was afflicted with a small tumour in one of his legs, which terminated in a mortification. He died August 16, 1821, aged eighty, in the full

possession of his faculties. His remains were deposited in the chapel of Lincoln's Inn.

Mr. Hargrave was of low stature—of grave, almost pensive, aspect, and had a slight hesitation in his speech. His manners were peculiarly mild, gentlemanlike, and conciliating. In three particulars he may be considered a beacon to modest merit; not to be too humble lest others should undervalue that worth, of which the owner does not appreciate the importance: not to be querulous, because ungrateful and fickle clients fall to the lot of all, and the world is a treacherous confidant: above all, never to despond; for a sanguine temperament, and a determination to persevere unflinchingly, are the most important elements of success. The lawyer struggling with difficulties, must ever bear in mind this valuable maxim—

"Tu ne cede malis,
Sed contra audentior ito."

But though his few errors may be noted with advantage, Mr. Hargrave will always remain a proud example of the manner in which a gentleman ought to cultivate his profession. He hoarded up no wealth; but he never stooped to a meanness, forsook a client, or trifled with a cause; and he has bequeathed the most precious inheritance, a good and spotless name, to his family.

T.

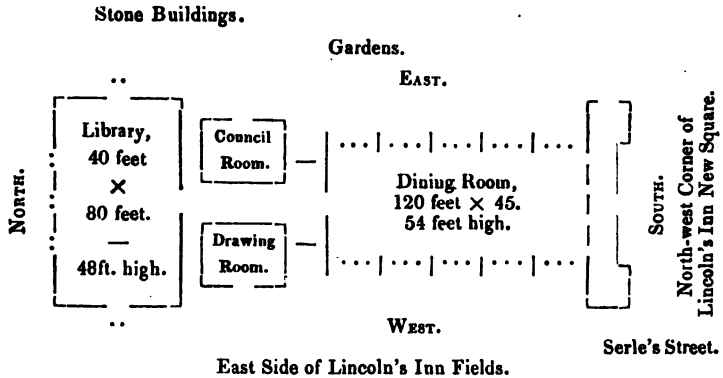
ART. VIII.—ARCHITECTURAL NOVELTIES IN LINCOLN'S INN AND THE TEMPLE.

1. *Elevations and Plan for the New Hall and Library in Lincoln's Inn.* By P. Hardwick. Printed for the Society.
2. *The Temple Church.* By C. G. Addison, Esq., Author of the Knights Templars. London: Longmans.
3. *A Full and Complete Guide to the Temple Church.* By C. G. Addison. London: Longmans.
4. *A Glance at the Temple Church, with Eight Illustrations.* By Felix Summerly, Author of Handbooks for Westminster Abbey, Hampton Court, &c. London: Bell and Wood.
5. *Fac-Simile in Colours of the East Windows of the Temple Church.* Executed by T. Willement. London: Pickering.
6. *The Restorations of the Temple Church.* By W. Burge, Esq., Q. C. London: Pickering.

"THE students of the University of the Laws," says Sir John Fortescue, quoted by Dugdale, "did not onely study the laws, to serve the courts of justice and profit their country, but did further learn to dance, to sing, to play on instruments on the ferial dayes, and to study divinity on the festival; using such exercises as they did who were brought up in the King's Court." If the members of our Inns of Court, or "Universities of the Laws," as Inns of Court may be called, are not now-a-days especially distinguished for their excellence in dancing, singing, and playing on instruments, it must be acknowledged that they are making a very considerable sensation in another branch of the fine arts. The Society of Lincoln's Inn is about to decorate its grounds with buildings which will be striking and highly ornamental features in that part of the metropolis, and the Societies of the Inner and Middle Temple have already effected the most perfect specimen of restoration of ecclesiastical architecture, which our age has yet witnessed. Considering the importance of these undertakings to the members of the principal legal corporations in more points of view than one, we shall take the liberty of making a few remarks on both of them. With respect to the new buildings in Lin-

coln's Inn we shall speak of what is about to be done, whilst in regard to the Temple Church we have rather to consider what has been so admirably accomplished.

The new buildings, which will form so ornamental a feature in Lincoln's Inn Fields, are to consist of a dining-hall, a drawing-room, a council-room, and a library. The following skeleton plan will indicate, better than we can do in words alone, the site of these erections.



East Side of Lincoln's Inn Fields.

The structure will be of deep red brick, interlaced with bricks of darker colour, such as may be seen at Hampton Court Palace and other buildings of the Tudor period. The quoins and dressings will be of stone. The style of architecture which Mr. Hardwick has selected may be referred to about the middle of the Tudor period—more inclining to the highly decorated perpendicular of Henry the Eighth's time than the cinque cento mixture of Elizabeth's reign. This style is appropriate as having been that of the hall and library of this Inn, erected in the reign of Henry the Seventh. As suggestive of quiet domestic comfort, probably no past style has stronger claims for adoption; most of our finest old halls and libraries are examples of it. Our readers who are architecturally learned will immediately call to mind the halls at Hampton Court, of Christ Church, Oxford, both of which perhaps owe their design to Cardinal Wolsey; the hall of the Middle Temple, which certainly ought not to be forgotten; the libraries of several of the colleges, both at Oxford and at

Cambridge. The building will be a very welcome addition in this locality, which contains no specimen whatever of the kind. In the adoption of the red brick we think Mr. Hardwick has shown good taste and judgment, for no material is so little deteriorated by the smoke of the eternal fires of the metropolis, and, according to general rumour, there is no place *smokier* in all London than Lincoln's Inn Fields. The two principal façades will respectively front Stone Buildings on the east and Lincoln's Inn Fields on the west; each has some different features which possess an interest of their own. Whilst the eastern front differs from the west in exhibiting the entrances to the buildings up terraced steps, the western front has an elegant canopied turret terminating the northern end. In other respects, each view has its points of resemblance in its square mullioned windows and turrets of the dining hall, bay windows of the ante-rooms and library, and gable of the library. The horizontal lines are picturesquely broken by the battlements, the pinnacles of the buttresses of the hall and its lantern, the chimney shafts, &c. There appears to be a very ample supply of light, an article of the value of which in the murky atmosphere of London our architects do not seem to be over careful or conscious. The gable ends of the two chief buildings, the hall and library, are unlike; that of the hall, on the south end, consisting of two square turrets, with a large central perpendicular window, as in Westminster Hall; whilst the ends of the library, which stand east and west, terminate in bay windows. In both apartments, the roofs are formed of beams of oak, springing from corbels, with panels and pendents. The hall roof is the most decorated of the two, and something like that of Hampton Court in its general features, though less elaborate; the sides of the hall are lined with panelling, and it is proposed to fill the windows with stained glass. The walls of the library are of course lined with book-shelves, and, as in the Bodleian, Christ Church, Oxford, &c. comfortable recesses for study will be formed by the book-shelves projecting into the room. The oriel window, judging from the print, promises to be very graceful.

We learn that the works are about to be commenced forthwith, and that it is expected that the roof will be fixed in less

than twelve months. If we understand the exact site correctly, the foundations of the new buildings will rest on the terraced walk in Lincoln's Inn Gardens, which was raised in the time of James I.

Before we speak of the noble restorations which are nearly approaching their completion at the Temple, it may be as well to remind our readers of the history of the connection between the original warlike Templars and their present peaceful successors; and it is not possible to tell the story more concisely than Dugdale has done in his Origines Juridiciales.

"About the beginning of King Henry the Second's reign, the Knights Templars, leaving their house in Holburne (situate on the south part of that street, where Southampton House lately stood, and upon which those new tenements, called Southampton Buildings, were lately erected), did, for their more conveniency, set up another habitation for themselves over against the end of a street heretofore called New Street, but now Chancery lane; which had thereupon the name of the New Temple, and contained all that space of ground from the Whitefryers, westward unto Essex House, without Temple Barr; yea, and part of that too, as appears by the first grant thereof to Sir William Paget, Knight, after Secretary of State to King Edward VI.

"That they thus settled themselves here about that time, is evident from the date of the Church, its dedication, which was in anno MCLXXXV, as by an old inscription yet to be seen over the dore is manifest. But the order of the Templars being throughout all Christendom supprest, about the beginning of King Edward the Second's reign, and their possessions here in England coming thereupon to the Crown, the King gave this house unto Thomas, Earl of Lancaster, who forfeiting it shortly after by rebellion, it returned again to the Crown; and was graunted first to Adomare de Valence, Earl of Pembroke, and after his decease to Hugh le Despenser the younger, for life; which Hugh being attainted in the first year of King Edward the Third, the right thereof devolved once more to the Crown, and might therein have continued, but that by a decree made in the Great Council at Vienna, anno MCCCXXIV, (about the 18th year of the same King Edward the Second's reign,) the lands of the Templars being

generally bestowed upon the Knights Hospitalers of St. John, Jerusalem, King Edward the Third granted this mansion unto the knights of that order here in England; who soon after (as the tradition is) demised the same for the rent of x^li^ per annum unto divers professors of the common law, that came from Thavyes Inne, in Holburne."

"There is nothing," adds Dugdale, "but tradition left to us for this statement in many points; but it is conclusive, from Chaucer's prologue to the Manciple,

> "A Manciple there was of the Temple,
> Of which all catours might take ensemple,"

that the Templars, as a legal body, were located here in Edward the Third's time."

It would be superfluous for us to enter into a full description of the restorations which have been effected in the Temple Church, magnificently developing themselves in polished Purbeck marble shafts, in arabesque vaultings of bright and animating hues, in the gem-like brilliancy of the stained glass, in the quaintly-carved oaken stalls, in the genuine old English encaustic tiles, in the noble sculptures of the old crusaders' effigies, inasmuch as the majority of our London readers must, by this time, be pretty generally acquainted with them; and we shall do no more than indicate them by means of a woodcut, for which we are indebted to a contemporary journal. There is also less occasion for description, because the works which are enumerated at the head of this article will be found to supply the information more amply than we can do, to those who have not already had, or who are not likely to have, personal experience of the new guise of the church.

As pictures convey more accurate impressions than words, so Mr. Summerly's "Glance" may be particularly mentioned, as it abounds in illustrations of the new works. Each page of this *brochure*, printed in black, red, and blue, is either ornamented with a lithographic sketch of parts of the church, or with portions of the heraldic cognizances and decorations delineated about it. Mr. Addison's "Temple Church" is a larger book, much fuller of historical details than the "Glance," but meagre in its illustrations. With some additions, it has been chiefly excerpted from his larger work on the "History of the

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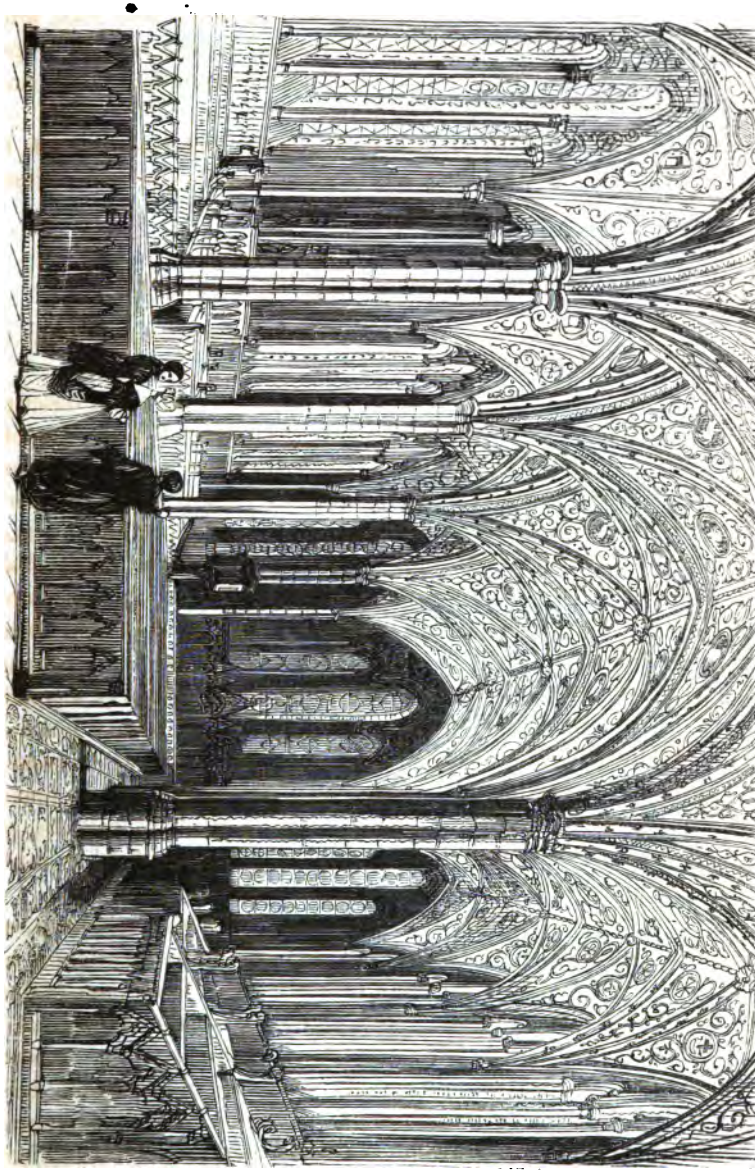

THE TEMPLE CHURCH.

Knights Templars." His "Full and Complete Guide" is a reprint of two chapters of the first-mentioned book. We mention these particulars lest a purchaser should imagine Mr. Addison's to be three separate and independent works.

But the fullest and most authentic account of the progress of the restorations, and of the grounds upon which they were undertaken, is furnished by Mr. Burge's pamphlet. This work may be taken as a sort of official report on the proceedings of the Committee who were intrusted with the superintendence of the works, drawn up by a gentleman who, a member of the Committee himself, has shown the greatest zeal and interest in them. Mr. Burge's work also contains many official documents which are not to be found elsewhere. The first extract we shall make from it furnishes us with some discriminating observations on the character of the building, made by Mr. Cottingham, the architect, who has amassed so remarkable and interesting a collection illustrative of the ecclesiastical architecture of the middle ages in our own country, and is distinguished for his judicious restorations at Hereford, St. Alban's, &c.

"The Temple Church is one of the most beautiful, and certainly the most interesting Gothic building in England. It is the building which at once decides the long disputed point about the origin of the pointed style of architecture, at least, in this country. This structure alone is quite sufficient to prove that the pointed style was not imported into England in a perfect state.

"The transition from the round to the pointed arch was by no means sudden. In the round part of the Temple Church we find the architect endeavouring to obtain an altitude and lightness in the character of his building, which compelled him to trespass on the solemn grandeur of the Norman style; for although the circular arch prevails throughout the exterior of the rotunda, it is evidently of a lighter character than the preceding Norman style. The carved work in the beautiful entrance door-way, and in the capitals of the window columns, fully shows that a transition was taking place. No doubt the circular colonnade in the interior greatly favoured the object in view, namely, that of obtaining by its elevation a greater quantity of light than the Norman style would admit. There is every appearance that one and the same master mind designed both the round and square parts of the Church. The central arch-way into the choir was not an after-thought; it was carried

up with the original circular wall work, and the lightness and elevation obtained by this dexterous movement from the circular to the pointed style, led to the entire adoption of the latter in the square or choir part. Besides, it is very doubtful whether any of the round churches in this country were originally complete rotundas. Certainly the Temple Church was not; for the oblong building on the south side, pulled down a few years ago, was undoubtedly a portion of the original design. The beautiful Norman Chapel at Ludlow, built soon after the Conquest, had a square choir attached to the circular part, carried up with it in a similar manner to this Church; and the later specimen of the kind at Maplestead had the square and the round parts built at the same time.

"It appears that the Temple Church was upwards of fifty years in building. This was not an unusual length of time for such a splendid edifice, but a much less period would undoubtedly have been sufficient to establish the pointed style of architecture; for the elevated effect produced by the most simple examples of the pointed arch was not lost to the keen observation of the Norman ecclesiastics, who were the principal architects of that period. They soon made themselves masters of its powers, and by adopting it, threw a flood of light into their buildings, which enabled them to complete the inimitable coup-d'œil of a Gothic Church by the introduction of stained glass, which the great thickness of the walls and smallness of the windows in a Norman building did not encourage.

"Having thus slightly described the leading features of the new style in the Temple Church, it is curious to contemplate the struggle which took place in the minor details of the round Church.

"All the windows are circular headed, and ornamented at the angles with slender columns, terminated by foliated capitals of a transition character, similar to those at the entrance door-way. The recesses formed by a series of columns above the stone bench in the aisle on the north and south sides of the entrance are decidedly pointed, retaining the Norman square abacus in the capitals of the columns, and the billetted moulding in the arches. The triforium is ornamented by an arcade of interlaced arches, a portion of Norman decoration, retained long after the ascendancy of the pointed style. I am inclined to think that the circular part of the oak ribs, and the richly carved oak boss in the centre of the ceiling, are portions of the original work, which might have been cut down from the top to accommodate a new roof. It was not at all unusual for the ribs of wood groining to have stone springers to a certain height, which is the case here; the boss and mouldings of the pre-

sent ribs are decidedly of very early pointed character. The cieling was probably finished in a domical form originally.

"No building in existence so completely developes the gradual and delicate advances of the pointed style over the Norman, as this Church, being commenced in the latter, and finished in the highest perfection of the former; the choir or square part of the Church is decidedly the most exquisite specimen of pointed architecture existing. There is a boldness in the conception, and a lightness in the execution, which charm every beholder.

"The groining of the ceiling is in perfect unison with the whole design. The ribs, light and elegantly moulded, rise from the caps of the slender marble columns, and branch out in such palmy and graceful lines, that the mind is quite prepared to meet the flowery canopy which they are made to support."

The oblong building which Mr. Cottingham mentions as interfering with the rotunda of the church, was a little chapel dedicated to St. Anne, on the south side of the Round Church, which Sir Robert Smirke had the barbarism to remove when he superintended the restorations of the exterior, in 1827.

"It contained," says Mr. Burge, "two stories: the lower floor was entered through a door-way, formed under one of the arches of the arcade, by a descent of five steps, and consequently so much lower than the Church. This apartment had two niches, probably for piscinas placed at its eastern end; there was also another recess. This apartment had a circular archway near the centre, three feet four inches in thickness, ornamented by a rib and supported by a column at each side. It was thus divided into two apartments, the first of which measured, according to the plan of the Society of Antiquaries, in the Vetusta Monumenta, 16 feet by 14; and the second, towards the east, 20 feet by 15. They were each lighted by a window in the centre towards the south, and the larger one had an additional small window near the east end. The roof was arched, and ornamented with cross ribs (having bosses at the centres), supported by columns at the angles. The upper apartment is described as having been similar in character to the lower one. It was communicated with by a door-way in the body of the Church, which led up a staircase to the opening.

"In 1825, portions of it fell down, and the whole was removed during the progress of the repairs of 1827. It must ever be a subject of deep regret that this building was suffered to perish."

Perhaps Sir Robert Smirke's sense of propriety was outraged by the tradition which was attached to this chapel. It

was said to have been a popular resort for married women who were desirous of becoming mothers; that in their distress at barrenness, they used to come hither and pass the night in prayer for the fulfilment of their desires, and that their prayers were generally efficacious.[1] Some of our readers may remember this little building, in which piles of musty records—the writs of covenant in fines—might be seen through its gratings.

Restorations in successive periods since the 10th year of Charles I., when the east end of the church was repaired, have been effected in this church.

"Having narrowly escaped the flames in 1666, it was in 1682 beautified, and the curious wainscot screen set up. The south west part was in the year 1695 new built with stone. In the year 1706, the Church was wholly new *white washed, gilt and painted within, and the pillars of the round tower wainscoted with a new battlement* and buttresses on the south side; and other parts of the outside were well repaired. Also the figures of the Knights Templars new cleaned and painted, and the iron work inclosing them new painted and gilt with gold. The east end of the Church was repaired and beautified in 1707."

Mr. Burge describes the appearance of the church before the recent works.

"The screen of '*right wainscoat*,' which in 1682 was erected at the west end of the oblong Church, and between that and the round Church, was adorned with ten pilasters of the Corinthian order, also three portals and pediments; and the organ gallery over the central entrance was supported by two fluted columns of the Corinthian order, and adorned with entablature and compass pediment. The inter-columns were large panels in carved frames, with an enrichment of cherubims near the pediment on the south side. The screen extended completely across the Church. The central archway was occupied by the organ, the ornamented front of which was carried up nearly to the ceiling of the nave.

"The side archways were, above the screen, carefully plastered up, so that their form was rendered invisible. The lower parts of these, and the centre archways, were filled up with glass doors and windows.

"This most extraordinary perversion of taste, and this utter indifference to some of the most striking beauties of the Temple

[1] See Anecdotes and Traditions, published by the Camden Society. No. clxxxi. p. 110.

Church, destroyed its entire character. The round and the oblong parts were detached from each other, and formed two Churches. The effect of the perspective obtained through these archways, and which gave length and height to the oblong Church, was lost. The character and beauty of the *entire* edifice having been thus destroyed, the two parts of which it consisted were also deprived of all which constituted the character and beauty of each.

"The beautiful columns and shafts of Purbeck marble, their foliated capitals, and the cornice or string course of Purbeck marble, were enveloped in whitewash and plaster. The clustered columns were concealed by an encasement of wainscoting reaching above the band which connected them at the centre, and they were further concealed by large massive monuments, which were affixed to them above their centre.

"The relative proportion between the two circles which was observed in all the round churches, and produced so peculiar an effect, was greatly impaired by the monuments affixed to the columns, and by the wainscot in which they were encased. It was still further impaired by placing two very high and cumbrous monuments in such a situation as not only to occupy a considerable space, but by their height, to obstruct the greater part of two of the circular windows on the north side. The clerestory lost its light and airy gracefulness by the partial blocking up of some of its windows.

"In the oblong part of the Church, the Purbeck marble pillars were encrusted with coats of plaster and whitewash. A floor was raised nine inches above the original pavement, and the intermediate space between was filled with loose earth, saturated with water, flowing from the graves in the churchyard. The height of the building was thus diminished. This raised floor, and the wainscoting and pewing of the whole Church completely concealed, not only the bases, but eight feet of the columns. The New History of London, published in 1708, thus describes what had been done in the oblong part of the Church: 'It was well pewed and wainscoted with right wainscoat, above eight foot high.' It extended round three sides, excepting the space occupied by the altar screen. Its entablature completely covered the cornice or string course of Purbeck marble at the base of the windows; the only part of the plinth or stone-seat which remained was that at the north-west angle. The monuments affixed to these columns still further contributed to impair their intrinsic beauty and effect on the edifice. Cumbrous and heavy monuments were also affixed to the sides, so as to encroach con-

siderably on the beautiful lancet-shaped windows, conceal their character, and affect the whole appearance of the aisle.

" ' The altar-piece extended still higher than the wainscoting; it was finely carved, adorned with four pilasters, and between them two columns with entablature of the Corinthian order, and enrichment of cherubims; a shield, festoons, fruit and leaves, enclosed with handsome rail and banister.'

" It covered not only the Purbeck cornice or string course, but concealed from view a considerable portion of the beautiful central window at the east end.

" A large heavy pulpit with carved arches, festoons, cherubims, vases, &c. and a large ponderous sound-board suspended from the ceiling, could not fail by their incongruous, as well as by their size and position, to contribute to that effect on the whole structure, which had been produced by the other *beautifications and adornments* bestowed on it."

" So little," adds Mr. Burge, " were the public acquainted with the character of the Temple Church, and with those parts of its style and construction which constituted its beauty, it may be mentioned that when the restoration was commenced in 1840, the removal of these *beautifications and adornments*, for the purpose of effecting the restoration, was regarded and publicly reprobated as an act of Vandalism, evincing an utter disregard for the ancient and original beauty of the Church, and a fond devotion to the frivolous and degraded styles of modern architecture. It was, in fact, considered, that these screens, &c. constituted the beauty and character of the Church, and that any alteration must necessarily be a sacrifice of beauty and character to fancied improvements in modern architecture."

It appears that the first advance towards restoring the church was made in 1825. Something had been accomplished in 1811, which at that time was called " complete." In 1840, however, it was found that " necessary reparation" could be no longer delayed; and the measures which were adopted are thus related by Mr. Burge.

" In the month of April of that year the two Societies made their order, that the roof and east end should be completely repaired, and the interior beautified, repaired, and warmed. A joint Committee was formed, consisting of the respective Treasurers and three Masters of each of their Benches, for the purpose of carrying into effect that order, and of reporting their recommendations thereon to their two Societies."

The Committee, it appears, "were deprived of the valuable services of Sir Robert Smirke," which, judging from his destruction of St. Anne's Chapel, and the works he actually did, we hold to be a very lucky accident for the architecture of the Temple Church. Fortunately, their choice fell on Mr. Savage, to whom the chief professional merit of the restorations is undoubtedly due. The works appear to have been much more extensive than was originally contemplated; and it is but justice to quote the account of them at length.

"The Committee, by their report of the 29th May, 1840, recommended to the Societies, 'That the ancient entrance doorway should be repaired and restored to its original state:

"'That the interior of the oblong and round Churches, with the tablets, monuments, pavements, &c. be repaired and cleaned, also the wood work of the pews, pulpit, reading desks, altar screen, organ loft, &c. be repaired, cleaned, and re-varnished.' They further strongly recommended that the stonework of the oblong and round Churches, viz. the Purbeck pillars, the groins of the ceiling, &c. should not be re-coloured, but be restored to their original state.

"That the two arches on each side of the organ at the west end of the side aisles should be opened, and that the Benchers of the two Societies should take into their immediate consideration the propriety of removing the screen under the organ, and the altar screen; in order that those portions of the Church might be fitted up in a manner more consistent with the general character of the Church.

"The two Societies by their orders of the 29th of May and 2nd of June, 1840, authorized the Committee to make such alterations in the screens as might appear advisable, and full powers were granted to them to give directions throughout.

"The Committee, in proceeding to execute the trust thus committed to them, found, on removing the pavement, that the bottom of the pews, pulpit, and reading desk, and the joists and wood work under them, were in the most dilapidated and insecure state, in consequence of the excessive dampness from the foundation of the Church, apparent even on the pavement; and it became absolutely necessary to take up all the pews. If they had been replaced, there must have been new joists under them; the decayed parts must have been removed, and, as the pews were panelled, they must have been entirely altered.

"The Societies were of opinion that, instead of incurring the

expense which would be unavoidable if they retained the pews, which were wholly inconsistent with, and injurious to, the style and character of the Church, seats ought to be substituted, which would contribute not only to preserve but to exhibit the beautiful effect of both, and which were used in other collegiate churches and chapels. It was a necessary consequence of this arrangement, that the pulpit and reading desk, which both in their size and character were wholly inconsistent with the style of the building, should be replaced by a pulpit and reading desk of more appropriate size and character.

"The pavement, upon its removal, was found not to have been the original pavement of the Church, which was much lower. The space between the new and the original pavements had been filled up with earth, nearly to the level of the floors of the pews. It became necessary, and it was determined, that the whole of the Church, including the round part, should be lowered to the original paving, so that the bases of the columns might be exposed, and that thus not only would there be an addition to the height of the interior of the Church, but the beauty of the building would be greatly increased, by showing the whole of the columns as they were originally erected. It was determined to place concrete under the pavement, and thus prevent dampness.

"Under the authority of the two Societies, the altar screen and railing were altogether removed. In consequence of this arrangement, and of the removal of the pews, it became necessary to remove the wainscoting round the Church, and restore the ashler or stone work. Under the same authority, the organ screen and the organ were also removed."

"In making the excavation required for some of the works, it was found that the drains on the north side and east end of the Church, and of the two original catacombs, were very imperfect. The drain through the catacombs, which was intended to take the leakage from the coffins, had little or no fall, and was almost entirely choked up, so that there was great dampness in the neighbouring ground; and this dampness was farther increased by a spring of water adjoining.

"The defective state of the former drains, the consequent dampness of the ground, and the decayed matter under the floor of the pewing, will sufficiently account for the noxious effluvia in the Church, of which there were frequent complaints, and which, on the introduction of warm air, would be more sensibly felt. The drains have been reconstructed, and the building will be preserved

by being rendered dry; the house of the Master and the adjacent chambers will be more healthy, and the catacombs will no longer be overflowed with water."

Again:

"It does not appear that any substantial repairs had been made for many years, and those which had been made had concealed and not repaired the dilapidated and decayed state of the Church. It was not until the thick coats of plaster and paint with which the columns had been disguised, and the monuments affixed to some of them had been removed, that the actual condition of these columns was ascertained. The joints of the marble, and considerable portions of the surface of the columns in the square Church, were found to be in a very decayed state. It would be necessary to insert a great number of new pieces, and to lengthen out the bases down to the original floor line. The six clustered columns of Purbeck marble in the circular part of the Church were found so shattered and injured, that it was indispensably necessary for the safety of the fabric that new columns should be supplied. After a very little scraping on the surface of the inner roof or stone groining, and raking out the loose joints of the stone ribs, it was discovered that the roof was in a very dilapidated and dangerous state throughout. Mr. Savage, in reporting on the state of the roof of the round Church, came to the conclusion that 'the roof was not in a fit state to remain, and that to repair it effectually would cost as much as a new one. It was in a very bad state, it was never constructed on any correct geometrical principle, but depended for its durability on the main strength of the pieces of timber, and the firmness of their construction. Those timbers were for the most part decayed and rotten in their ends, and the connections broken. They have been helped by strapping, scarfing, and bolting on pieces; but the roof is far from being in a state of durable safety. And, in fact, it has thrust out the walls of the tower, so that the inside of the wall, instead of being perpendicular, measures 30 feet 6 inches in diameter at the ceiling, and 29 feet 6 inches only above the principal arches.

"The construction of the roof was such as to throw a great strain upon the oak-moulded arch ribs of the ceiling, whereas with a well contrived roof they would have had nothing to carry but their own weight, the arch ribs were consequently much crippled and damaged, besides being quite rotten at their feet, or where they rise from the stone springers. On removing the wainscoting and monuments from the walls of the Church, it appeared that there

were parts of these walls which consisted only of rubble masonry. According to the usage in the early history of Church Architecture, those parts were covered with arras or tapestry; as no such decoration is now used, it became necessary to face the whole with ashler of Caen stone to correspond with the other parts of the walls.' "

The removal of the organ, which was placed in the centre archway between the two churches in 1687, was a subject of much deliberation with the Committee, who took every pains to obtain the best advice. They sought the counsel of Messrs. Savage, Sidney Smirke, Cottingham, Blore, Willement, and Etty, who all decided in favour of its removal, and, with the exception of Mr. Blore, concurred in adopting its present situation, according to Mr. Savage's design. Their testimony is printed at length by Mr. Burge, but we cannot find room for it. Though much grumbling was uttered at the removal, we think no one will doubt that the Benchers acted most judiciously. They have set an example which many of our cathedrals, &c. would do well to follow. Neither the architectural beauty of the church, nor the musical effect of the organ itself, is in the slightest degree deteriorated; on the contrary, both are improved by the change.

The coloured decorations which have been introduced are perhaps, on the whole, that feature of the church which is most startling, accustomed as a modern eye is to the cold monotony of white-wash. The absence of colour in architectural decoration is a comparatively modern innovation, dating no further back than the time of the Puritans. Long after the Reformation, colours the most positive and brilliant were used on all occasions in the cinque cento architecture of Elizabeth and James, as any one may still detect on the Burleigh and other monuments in Westminster Abbey and elsewhere. Anterior to the Reformation we may trace the use of colour in architecture, as far back as the earliest specimens of Norman architecture. The colours in the mural decoration of the arcades of the Triforium in Rochester Church are still fresh. But even if we had no precedents for the use of colour, instead of an abundance, we would contend for its employment, and on the same ground that Rowland Hill was accustomed to contend for the use of music in devotion: he saw no reason why

music should be handed over to the devil! We say the same of colours, one of the essential beauties of all nature.[1] Some fifty years ago, Barry (whose fine historical pictures may still be seen daily, except on Wednesdays, at the Society of Arts in the Adelphi), with other members of the Royal Academy, offered to decorate St. Paul's with paintings *gratis;* but the dean and chapter, with apathy and blind ignorance in more senses than one, refused the offer, preferring the puritanic white-wash. All thanks to the Temple Church Committee, that they have had the courage and good taste to revert to the practice of our ancestors, and call in the aid of colour. Our only complaint is, that it is not carried far enough. Once introduced, it must spread itself everywhere. We can afford to let the Square Church remain as it is for a time, though colours and gilding are much wanted on the mouldings of the doorways at the east, and on the organ-gallery. But we must pray the Committee to extend the coloured decoration over the "Round:" and let us express a hope that Mr. Willement's noble gift of the single stained glass window in that part, will prompt others to hand down to posterity similar memorials of their generosity, in preference to the use of tasteless, undevotional monuments, which we rejoice in seeing deposited in the Triforium.

We extract some parts of Mr. Willement's report on the

[1] Perhaps we may be allowed to quote what Hooker, who was a Master of the Temple, says, in reference to this subject of Church decoration. "Touching God Himself, hath He anywhere revealed that it is His delight to dwell beggarly? and that he taketh no pleasure to be worshipped saving only in poor cottages? Even then was the Lord as acceptably honoured of His people as ever, when the stateliest persons and things in the whole world were sought out to adorn His Temple. This most suitable, decent, and fit for the greatness of Jesus Christ, for the sublimity of His Gospel. Sith the Prophet David doth mention a natural conveniency which such kind of bounteous expenses have, as well for that we do thereby give unto God a testimony of our cheerful affection, which thinketh nothing too dear to be bestowed about the furniture of His service; as also because it showeth to the world for a witness of His Almightiness, whom we outwardly honour with the chiefest of outward things, as being of all things Himself incomparably the greatest. Besides, were it not also strange if God should have made such store of glorious creatures on earth, and leave them all to be consumed in secular vanity, allowing none but the baser sort to be employed in His own service? To set forth the majesty of kings, His vicegerents in this world, the most gorgeous and rare treasures which the world hath, are procured. We think belike that He will accept what the meanest of them would disdain."

decorations, which have an intrinsic antiquarian interest of their own, besides their connection with the church.

"Considerable remains were discovered on the ribs and vaultings of the Temple Church, to prove that these had been originally painted in powerful colours, but not in sufficient extent, to warrant a restoration of any particular pattern. The manner in which it is now being executed is founded on examples, which still remain of the same period, and which strongly assimilate to the decorations of the illuminated manuscripts coeval with the Church. The devices in the circular panels of the centre vaulting, are founded on the arms at present used by two honourable Societies now holding the Temple; those in the aisles are, the cross peculiar to Knights Templars; their banner and cri-de-guerre, and the very expressive device of the cross of Christ triumphant over the crescent of the Saracens; this has been copied from an ancient seal belonging to the Master of the Temple, in the year 1320—(some account of these devices and their origin will be given farther on). The three divisions which occupy the easternmost end of the centre and aisles, will be strongly differenced from the others by greater richness of pattern and colour, and by the ornaments being entirely of a sacred character; the I. H. S., the A. Ω.—the emblems of the Holy Evangelists, &c. &c."

Again:

"*On the Devices introduced on the Vaulting of the Temple Church.*

"The Church itself was originally dedicated to God and our blessed Mary. The habits of the Knights Templers were white, charged with a red Cross, of form peculiar to the order; this has been introduced in the leading panels of the side aisles. These knights styled themselves the 'poore soldiers of Jesus Christ and of the Temple of Solomon;' and Fairne (Theater of Honor) tells us, from William of Tyre, 'that they carried to warre their banner, halfe white and halfe blacke, which they called Beau-Seante, which is in French term Bieu-Seant; because they were and shewed themselves wholly white and fayre towards the Christians, but black and terrible to them that were miscreants.' This banner, and their cri-de-guerre, has been adopted also as one of their devices on the vaultings. A manuscript history, by Matthew Paris, contemporary with these knights, represents, in a sketch by the historian, this banner; but the black part of the banner is there only one-third part of the whole. The third device, representing the Cross of our Salvation raised above the crescent, has been copied from a seal of Milo de Stapleton, Master of the Temple, and is

affixed to a charter, remaining at this time in the British Museum, and dated 1320.

"The devices on the vaultings of the centre of the Church, are the Horse represented with Wings, and the Holy Lamb, being emblematical of the two Societies. On a strict search through the records of the Herald's College, no entry can be found of any grant of arms having been officially made to either of these Societies; and from the extracts which follow, it would appear that the date of their first use, which however is evidently not earlier than the end of the sixteenth century, is not clearly defined.

"Stowe, in his 'Annales,' 1631, says, 'it appeareth upon record and in good authors, that the Knights Templers bore a shield argent, charged with a crosse gules, and upon the nombril thereof a Holy Lambe; but before they took this device they bare a horse (as Matthew Paris writeth) with two men riding upon him, and this (as he sayth) was engraved in their common seale. But if the Fellowes and Gentlemen of the Inner Temple have taken for the device or ensigne of their College a Pegasus or flying horse, sables or gules upon a shield or, as I hear they did in the reign of the late Queene of immortal memory, then are they already farely armed. And because the utter Temple neither is, nor was, ever any Colledge or Society of Students, and therefore not to be considered here, I will leave the choice of either of those old devices and ensignes to the Gentlemen and Fellowes of the Middle Temple, they not having as yet, to my knowledge, chosen or appropriated any ensigne to their Society or Colledge.'

"Carter, however, tells a different story: 'The Middle Temple beareth, for distinction, argent on a cross gules the Holy Lambe, or. It is to be understood, that before the order of Knights Templers assumed to themselves the said coat armour they now wear, that they did embrace, as to them appropriate, this device, a Horse galloping with two men on his back. The which ensigne was usually engraven on their signet or common seal.' 'The Society of the said Inner Temple hath lately assumed to themselves a Pegasus, whereof in particular I spare to relate any more; for the same is vulgularly known to all. The ensigne is azure a Pegasus argent.'

"In Dugdale's 'Origines,' 1671, the arms of both the Societies are given exactly as they are now used.

"In an edition of Matthew Paris, fol. Lond. 1640, is a rude wood-cut, representing two knights seated on the same horse, and also a sketch of their banner, which has been already referred to. These knights were probably sketched from an impression of their

original seal. In the 'Sceau de la France,' for 1834, is a copy from an impression taken by the new process of engraving; it is not very clearly defined; but the horse and the two knights are perfectly evident.

"The arms now used by the Society of the Middle Temple, appear clearly to have been founded on the device of St. John, which was undoubtedly borne by the Knights Templars, as is evident from a seal attached to a charter still remaining in the British Museum, and dated 1304. The Lamb bearing the flag fills the whole seal; the legend around it being 'Sigillum Templi,' and on the reverse a man's head in profile, with the continuation of the legend 'Testis Agni.' The Society of the Middle Temple no doubt placed the Lamb on the Cross of St. George, to designate their nation, and thus distinguishing themselves from the ancient knights.

"The derivation of the winged Horse, now used as arms by the Inner Temple, is not so easily traced as the Lamb of the other Society; it very probably took its rise from the earliest device of the Knights Templars; the two knights on the same Horse, which an imperfect inspection of an imperfect seal, interpreted the two Knights into two wings, which the classic taste of the reign of Elizabeth might induce the Society to think a very pretty device, and the error has been, without further examination, perpetuated."

The windows at the east end of the church have been pronounced (with few dissentients) to be the finest works of the kind which have been executed in modern times. A faithful copy of them, coloured, has been published by Mr. Pickering, at a very moderate cost.

"The designs generally have been founded on stained glass windows still extant, which were executed at the same period as the erection of the Temple Church, so that the whole decoration may be consistent and harmonious. The finest windows of this period were composed in a very similar manner to the early Mosaic; of small pieces arranged in regular panels, containing subjects from Holy Writ; the intervening spaces filled by foliage ornaments, and the whole, when there was sufficient space, enclosed within a rich and elaborate border. Such a border is particularly necessary in the centre opening of the middle eastern window here, to reduce its proportions to a more perfect accordance with the openings of the other windows. In all the examples of this period the tint of Heaven particularly predominates, as may be observed in the finest windows of Canterbury Cathedral; some of the best examples in

the Churches at Rouen; in the Cathedral at Ulm, in Austria; and more particularly in that gorgeous collection still remaining in the Sainte-Chapelle, at Paris.

" 'One of the great errors in the modern Churches of the pointed style, is the formation of windows to be filled with white glass, of the same expanse as those which in the old Churches were purposely formed for the admission of painted glass. Stained glass was considered necessary to produce that subdued light, so conducive to that religious feeling and that calm devotion required in a place dedicated to the worship of God,—and the representations contained on it produced, particularly on the unlearned, the most powerful impressions of those events, judgments and mercies which are recorded in the Holy Scriptures.' "

In such a work as this restoration, which is almost tantamount to a series of new experiments, it is not difficult to find faults when the works are done; and there are some points—such, for instance, as the height of the benches in the aisles, and the stone screen before the altar—which the Committee, if it had its work to perform over again, would no doubt avoid. But, taken as a whole, there are fewer mistakes and anachronisms than could possibly have been expected; and we are disposed to be entirely grateful.

"Nothing," says the 'Glance,' "so complete as the works at the Temple Church has yet been seen. They are the beginning of a practical, convincing, and peaceful crusade against the puritanic misdeeds which have been accumulating upon our buildings since the Reformation. It is no idle prophecy to say that henceforth marble shafts will be peeled of plaster; that washes, white, grey, and yellow (the pet wash at venerable Oxford), will give place to rainbow colours; that black-and-white pavements, chequered like chess-boards, chilly and ugly, will make way for the warm old English encaustic tile, red and amber patterned; and that windows of glass, 'brittle, crazy, waterish, bleak, and thin,' will become glorious, translucent blazes of jewelry—

> 'Doctrine and life, colours and light, in one
> When they combine and mingle, bring
> A strong regard and awe.'

Again will the Church, if it see its true interest, resume its natural duty as the great foster-parent of the arts; and the

artist will find in the Church a far loftier aim for his genius than in any parliament houses, however much they may inspire, as they ought justly to do, his patriotism."

But there are cavillers at the principle of these ennobling works: they murmur at the sixty thousand pounds which are reported to have been spent,—saying, "To what purpose is this waste? Why not have built half a dozen churches or a dozen chapels? Why not have given the money to the poor?" This comes from a class of economic grumblers, who prefer twenty shillings worth of Sheffield plate to twenty shillings worth of genuine silver,—who are ready at all times to substitute mediocrity for perfection, provided the thing passes under the same name. We utterly deny that any dozen of barn-like chapels would have one tithe of the effect in promoting religion as this beautiful work. It is not the Temple Church itself, but the example it sets which is so valuable. Push the argument about plain churches to an extreme, and we might dispense with churches altogether, as men could be equally pious, like the Welsh shakers, under the canopy of heaven. For these cavillers, we reprint an incident out of St. Matthew's Gospel, and leave them to find out its application. "Now when Jesus was in Bethany, in the house of Simon the leper, there came unto him a woman, having an alabaster box of very precious ointment, and poured it on his head as he sat at meat. But when his disciples saw it, they had indignation, saying, To what purpose is this waste? For this ointment might have been sold for much, and given to the poor. When Jesus understood it, he said unto them, Why trouble ye the woman? for she hath wrought a good work upon me. For ye have the poor always with you; but me ye have not always."

H. C.

ART. IX.—PRIVATE BUSINESS OF THE HOUSE OF COMMONS.

Reports of Select Commitees of the House of Commons relating to the Private Business of the House, 1836 *to* 1842.

We propose in this article to give some account of the alterations (improvements we may truly call them) which have recently been made in the conduct of the private business of the House of Commons.

The great increase which of late years has taken place in the number of private bills has forced upon the House the consideration of the unsatisfactory state of its practice with regard to this branch of its duties, and accordingly it has been the course of the House for several years past to appoint a select committee at the beginning of each session for the purpose of considering "whether any and what improvements could be adopted in the mode of conducting private business." It is of the results of the labours of these committees that we propose to give some account, accompanied with a few suggestions as to what, as it appears to us, still remains to be done.

Of the general nature of the proceedings of the House with regard to private bills, most of our readers are probably aware. The bill is not introduced on *motion,* as in the case of public bills, but a *petition* is presented by the promoters of the object proposed to be accomplished by the bill, praying for leave to bring in the bill. This petition is referred to a select committee to inquire whether the *Standing Orders* of the House with regard to the proposed bill have been complied with. Upon the report of this committee that the Standing Orders have been complied with, leave is given to bring in the bill. It is accordingly brought in and read a first time, and, after a certain interval, read a second time and referred (not to a committee of the whole House, as is the usual practice with regard to public bills, but) to a select committee, who are to inquire into the truth of the preamble and to examine in detail the clauses of the bill, and report it to the House with such amendments as they think fit. Upon the report of this committee (supposing the preamble proved) the bill is ordered to be engrossed, and, after a limited period, read a third time and passed.

Certain limited periods must elapse between the several stages of the progress of the bill through the House, and notice of these several stages is required to be given by the agents for the bill in an office, connected with the House, called "*The Private Bill Office.*" Parties desirous of opposing the bill on any of the grounds which are the subject of inquiry before the two select committees that have been mentioned, are allowed to be heard before those committees on presenting a petition to the House stating the nature of their objection or complaint, and praying to be heard to substantiate the allegations of their petition.

The *Standing Orders* above mentioned, the compliance or non-compliance with which is the subject of inquiry before the select committee on the petition, are certain regulations of the House, which require that before a private bill is brought in, certain public notices shall have been given, or plans deposited, or applications for consents made to parties whose property will be affected, or other preliminary steps taken, varying according to the nature of the proposed bill. There are other Standing Orders regulating the constitution and proceedings of the committees, the proceedings in the Private Bill Office with regard to notices, &c., the fees payable to the officers of the House, and some other matters.

The *Private Bill Office* is a public office in connection with the House (first established in 1811), where is kept a register of every step taken in the case of each private bill; where the name of the agent conducting the bill is lodged, and where notices are required to be given, and a copy of the bill, with plans, &c. lodged.

The constitution and proceedings of the select committee on the petition and on the bill, form the great subjects of inquiry before the committees whose reports are referred to at the head of this article.

Formerly these committees were open to all the members of the House. They were, in fact, not select committees, but committees of the whole House, sitting for convenience in the morning above stairs instead of in the House. It was afterwards considered expedient to reduce the number of members serving on these committees; and with a view, as it is supposed, of preserving some proportion between the number of mem-

bers locally connected with the object of the bill and of those not so connected, what are called "*County Lists*" were made out under the direction of the Speaker, each list containing (acording to resolutions of the House dated November, 1826, the last prior to the reforms of which we are speaking) 120 members, of whom one half, *placed above the line*, were taken from the county immediately connected with the object of the bill and the adjoining counties, and the other half, *placed below the line*, were taken promiscuously from other counties.

Each bill was referred to the list for the county with which it was connected, and the members named in that list, with such others as the House ordered to be added to them (and which order was made as a matter of course on the application of any member), constituted the committee for that bill. Of the committee so constituted five was the quorum; that is to say, before the business could commence five members must be present, but for the rest of the sitting the committee might consist of any number from 1 to 120. In practice, we believe, except in cases of bills that were opposed, not even five were considered necessary to make the committee; the chairman being present and the *names* of some four other members, who happened to be about the House, being handed in to the committee clerk, the rule as to the *quorum* was considered to be sufficiently complied with.

The complaint that was made against these committees was, that whereas the matters that were referred to them for investigation were matters in a great measure depending upon evidence, yet the committees by no means conducted themselves as judicial bodies; that canvassing was openly practised; that members came in to vote without having heard a word of the evidence; and that the result of each division depended more on the *whip* that had been made, than upon the facts which had been proved.

Prior to the late changes the constitution of the *Committee on the Petition* was the same as that of the committee to which the bill is referred after the second reading. Originally the *Committee on the Petition* was not, as at present, merely or at all a committee for inquiry into compliance with the Standing Orders. It seems to have taken its rise in that ancient jealousy of the House, of imposing any burthen on

the subject, without the matter having been previously considered in a Committee of the House, and the reference to a committee was confined to those bills by which tolls or duties were proposed to be levied on the subject. The duty of the committee was in fact to inquire whether a *primâ facie* case was made for the bill, such as to justify the levying of the proposed tolls; and afterwards, when it was thought expedient by Standing Orders to require public notice to be given of the intention to apply for any such bill, and it became the first duty of the Committee on the Petition to inquire into compliance with those Standing Orders, it still continued a part of their duty to inquire generally into the merits for the proposed measure. In the terms of the reference, they were "to examine the matter of the petition, and report the same, as it should appear to them, to the House." The *Committee on the Bill,* under the form of inquiring into the truth of the preamble, repeated the inquiry which had already been made before the Committee on the Petition, as to the general merits of the bill, but with this difference, that before the *Committee on the Petition* the inquiry was *ex parte,* and before the *Committee on the Bill,* parties were allowed to be heard against the bill; and with respect to those bills which were not required to be referred to the *Committee on the Petition,* they inquired into the compliance with the Standing Orders. In addition to this, it was their duty to examine in detail the provisions of the bill.

The committee whose labours we are considering, proceeded, first, to deal with the *Committee on the Petition,* and here very little difficulty seems to have been experienced. The result has been, *firstly,* a new and better defined distribution of the duties of the two committees, those of the *Committee on the Petition* being confined to an inquiry of a judicial nature merely, viz., whether the Standing Orders as to matters preliminary to the bringing in of the bill have or have not been complied with; and, *secondly,* an entirely new construction of the committee itself, of a corresponding character.

The practice as to the *Committee on the Petition* is now as follows: At the commencement of every session, a committee is appointed by the House, called "*The Select Committee on*

Petitions for Private Bills," consisting of forty-two members, with power to divide itself into sub-committees consisting of seven members each. In practice the same members are with rare exceptions re-appointed in each succeeding session, so that the body acquire something of a permanent character, with the advantage of the experience derived from that circumstance. It is before one of these sub-committees that the compliance with the Standing Orders is to be proved (*five* being the quorum in opposed cases, and *three* in unopposed cases), and parties are allowed to be heard before those committees upon petitions complaining of non-compliance with the Standing Orders presented to the House three days before the sitting of the committee.

The duty of the sub-committee is simply to inquire into the compliance or non-compliance with the Standing Orders; and if they report that the Standing Orders have *not* been complied with, they are to report the facts upon which their decision is founded, and any special circumstances connected with the case.

If the finding of this committee be against the bill, the bill is not therefore necessarily lost, but the matter is then referred to another committee, called "*The Select Committee on Standing Orders,*" not by way of appeal, but as a committee having powers of a discretionary character, and who, *upon the facts found by the former committee,* are to report to the House, whether such Standing Orders as have not been complied with ought or ought not to be dispensed with, and whether in their opinion the parties should be permitted to proceed with their bill, or any portion thereof, and under what (if any) conditions. This committee, like the former, is appointed at the commencement of each session, and is composed of eleven members, including the chairmen of the committees and sub-committees on petitions.

The committee on Standing Orders has also a farther duty of a discretionary character to discharge, with regard to petitions which are occasionally presented for leave to dispense with any of the *Sessional* Orders of the House relating to private bills. These petitions, instead of being determined directly by the House, as formerly, are now required to be referred to the Select Committee on Standing Orders, who are

to report to the House, whether such Sessional Orders ought or ought not to be dispensed with.

By common consent, this change in the constitution of the *Committee on the Petition* has worked well: canvassing has ceased; questions are decided according to the evidence, and there is considerable uniformity in the construction of the Standing Orders, and in the proceedings of the sub-committees.

Much greater difficulty seems to have been experienced in dealing with the question of the *Committee on the Bill.*

Meanwhile, in the House of Lords, a most important change was made in the constitution of their committee on private bills. Instead of referring the bill, as theretofore, to a committee open to all peers who had taken their seats for the session, the House of Lords, in 1837, came to a resolution of referring every private bill to a select committee, consisting of five peers only. For selecting this committee, the Lords, at the beginning of the session, appoint a committee of selection, consisting of the chairman of committees and four other peers, proposed to the House by the Lord Chancellor. This committee of selection choose the committee to sit upon the bill, their object being (according to the evidence of the Duke of Richmond, a member of the committee of selection), to select peers without any interest, and, as far as possible, without local knowledge. The committee so chosen sit, de die in diem (except Saturday) from 11 till 4.

The Select Committee of the House of Commons on Public and Private Business (1837), in their Report, adverted to this change in the constitution of committees in the House of Lords, but they did not recommend the adoption of a similar plan by the House of Commons, nor were they then prepared to recommend any alteration in the constitution of the committees of the House of Commons.

"This plan (they say) proposes that each private bill should be referred to a committee of five members, named by the House under certain rules, whose attendance should be compulsory.

"Upon this your committee have to remark, that however well such an arrangement may operate in the other House, it is not one which they could recommend for adoption to the House of Commons. The members of the other House are bound to act under a sense of responsibility to the public generally, but without any

special duties towards any particular and special portion of it. The members of the House of Commons, on the contrary, though bound by the same general rule of duty, are also immediately responsible to particular bodies of electors, and each particular constituency looks upon its representative as specially charged with the duty of watching over their interests in matters of private business, and have a right to his services upon any question of the kind. Nor can it be denied that there is advantage derived from the conduct of business of this nature being entrusted to those who, from local acquaintance with the particular places to be affected by a private bill, or personal communication with those who are interested, can bring a more minute knowledge of the facts to the consideration of the subject.

"Your committee see nothing, therefore, in this plan, which should induce them to recommend its adoption to the House of Commons.

"Neither could your committee, from such consideration as they were enabled to give to the subject, see sufficient ground to suggest a change in the present mode of referring private bills to list committees. Upon the whole, it appeared to them, from the testimony of such of their members as had paid great attention to the business transacted by these committees during this and the last session, that the matter brought before them had for the most part been well considered and fairly discussed. Exceptions might indeed be stated; but upon the whole they are not of an extent or a character to warrant their recommending a change.

"Your committee, therefore, are inclined to think that it would be very difficult to alter with advantage the present mode adopted, though at the same time they must repeat the recommendation offered by the Railway Committee of last session, and which was adopted by the House, although, as they think, too little acted upon; namely, that the House should strictly scrutinize the Reports of their List Committees upon any subject which has been referred to them, and without hesitation exercise its judgment, either reversing their decisions, if grounds shall appear for doing so, or referring the matter back for a fresh report and further investigation."—*Report*, 13th July, 1837, p. 7.

We may observe, in passing, that the argument founded on the difference of the duties of the members of the House of Lords and those of the House of Commons, will hardly bear examination. If the objects of the committee can be best attained by a committee in the nature of a judicial tribunal

(according to the view taken by the House of Lords), as to which we at present express no opinion, the duty of the member to his constituents can be no reason for not adopting that kind of committee any more than in the case of the committees on election petitions. And surely the recommendation of the committee, that the House should freely reverse the decision of the committee on the bill is not consistent with sound wisdom. After the House has referred a matter to a select committee for the purpose of more deliberate investigation than it is itself able to give to it, the House surely ought not, with less perfect means of forming an opinion than those possessed by the committee, lightly to overrule the conclusions of that committee. The House must no doubt reserve to itself the power to reverse the decisions of its committees, but it should be rarely and upon extraordinary occasions only exercised.

But we shall recur to this topic in a subsequent part of this article.

Though the committee whose reports we are considering were not prepared to recommend any alteration in the constitution of the *Committee on the Bill*, yet with regard to the share directly taken by the House itself in the passing of the bill, they made a very important suggestion; we mean with regard to the second reading of the bill. It is surprising with how little information the House had theretofore proceeded to the second reading of the bill. Our readers are perhaps not aware, that although the private bill is printed for the use of members from its earliest stage, yet the bill so printed is not, as in the case of public bills, circulated among the members as a matter of course. A copy is given by the agent for the bill to a few members whom he may hope or desire to interest in the measure, and a few copies are deposited with the doorkeepers of the House, for the use of such members as may think fit to apply for them. The House, therefore, had little means of forming an opinion about the bill, even supposing a discussion to take place on the second reading, which would only be the case if some party were interested in opposing it; but supposing it unopposed, it would be read a second time as a matter of course, the House being in utter ignorance of the nature of the measure it was passing. The bill being so

read a second time, it would go into committee, where (still supposing it unopposed) it would be passed *pro formâ* merely, the committee not so much as looking at the marginal notes of the clauses: it would then be reported, engrossed, and read a third time and passed, the House continuing in the same state of ignorance as at the second reading. It is frightful to think what an amount of injustice might thus have been committed under the form of law; and but for the supervision exercised over private bills by the chairman of committees of the House of Lords (which will presently be adverted to), this no doubt would have been the case to a great extent. As it is, there can be no doubt that the House has, in utter ignorance, passed many measures injurious to the public and oppressive to individuals, which had the House been aware what it was doing, it would at once have rejected. The notorious case of the Glasgow Lottery, which was authorized by a clause in a private act, is an instance of the House in utter ignorance giving its sanction to a project which, if the House had been aware of what it was doing, it would not have entertained for a moment. Other instances of the like nature are those of bills for the incorporation of trading companies, whereby the members of the company have got rid of individual liability, and bills authorizing the imposition of passing tolls for the benefit of some dock or harbour company.

With a view to remedy this evil, the committee in the Report already referred to, suggested that some measure should be adopted by which the House should be more amply informed, previously to the second reading of all private bills, of the nature of the bill itself; and they accordingly "recommended that some officer of the House should be instructed, under the direction of the Speaker, to prepare a breviate[1] of every private bill, explaining the object of the bill, the mode in which it is proposed to effect it, and whether any and what powers are given not now afforded by law: and that no bill should be read a second time until six days after such a breviate shall be laid on the table of the House, and printed for circulation amongst members."—*Ibid.* p. 8.

[1] A document called a *breviate* was already known to the House. It was prepared by the agent, and stated very generally the nature and object of the bill, and was supposed to be read from the chair by the Speaker at the first reading of the bill. For any practical effect it seems to have been wholly disregarded.

This recommendation was adopted by the House, and in the following session resolutions were passed in conformity with it. In compliance with these resolutions, the then Speaker (Abercromby) applied to Mr. Booth, of the Chancery bar, to undertake the task of preparing breviates, in conformity with the recommendation of the committee, and breviates were accordingly prepared by that gentleman through the session. The measure seems originally to have been considered as an experiment only. The appointment was renewed the following session, and at the close of that session it was made permanent, Mr. Booth consenting to abandon his private practice at the bar.

By subsequent orders of the House certain private bills, viz. Divorce, Name, Naturalization, and Estate Bills, not relating to crown, church, or corporation property, or property held in trust for public or charitable purposes, are exempted from the regulation as to breviates, and the breviate is required to be on the table *three* clear days instead of *six*. A breviate also of the amendments made in the Committee on the Bill is required to be laid on the table of the House, at least the day previous to the consideration of the Report on the Bill.

As a means of affording assistance to the House in the share directly taken by it in the passing of private bills, it must be admitted, that the institution of the breviates is a considerable step in the way of improvement. The breviate may also be of some assistance to the Committee on the Bill, in bringing them readily acquainted with the general scope of the bill, and its leading provisions; but the main difficulty, viz., the constitution of the committees, and the supervision in detail of the provisions of the bill, it left pretty much as they were.

The committee which sat in 1838 went very fully into the question of the constitution of the *Committee on the Bill*, and examined a considerable number of witnesses, chiefly Parliamentary agents. The witnesses were unanimous in their opinion as to the unsatisfactory working of the committees as then constituted. They described the members of the committees as acting as partisans, rather than as judges or commissioners of inquiry. A good canvass was, they said, deemed more important than a good case: with a good case they were

constantly in danger of being tripped up by an adverse vote in committee: with a bad case, where the object is often to defeat the opposite party by delay, great facilities were afforded for this sort of tactics, the members of the committee, if disposed to act as partisans, having it in their power to render great assistance to counsel in protracting the proceedings.

The witnesses were unanimous in favour of reducing the number of members serving on the committee, and they were almost unanimous in favour of the plan adopted in the House of Lords. They were much pressed by some members of the committee, as to whether the local knowledge of members was not valuable in committees:—whether the members were not useful in bringing about compromises:—whether they were not of great value in the case of poor constituents, who could not afford to oppose a bill, through the expensive means of agency and counsel:—and whether if local interest were withdrawn from the committee, there would not be danger that it would be brought to bear in the House?

To these questions it was answered, that the evils of the local bias more than outweighed the good of the local knowledge:—that all the information upon which the committee were to proceed might be brought before it in the regular way, by the examination of witnesses, and that it was better that it should be so brought forward in the hearing of both parties, than that it should be originally possessed by the member of the committee, or should be acquired by him from representations made to him *ex parte:* that though it were true that through the intervention of local members parties were brought together, mutual concessions made, and compromises effected, yet that those compromises, in the majority of instances, were an injustice towards one party, which he thought it better to submit to than incur the expense and uncertainty of insisting upon what he considered his right, before a tribunal so imperfectly constituted as were the then committees. And with regard to the local or party interest, which, if banished from the committee, it was apprehended might be exerted in the House, it was considered that it would less hurtfully be exerted there, in its legitimate sphere, than in the committee, the more especially if the House were acting upon the report

of a committee so constituted, that it might lean with confidence upon its conclusions.

The Committee of 1838 were still not prepared to recommend any change in the constitution of the *Committee on the Bill*, and they merely submitted the evidence which had been taken by them to the House, from which it would appear they say, "That the constitution of the present List Committees upon the Bill, and their mode of conducting business, is universally complained of." They however say that "the subject is one of so much importance, and the constitution of Committees on Private Bills, and their mode of transacting business according to the present system is avowedly so far from satisfactory, that they deem the further consideration of it well worthy the attention of the House at the earliest period of the next session."—*Report, 4th August*, 1838, p. 5.

Two members of the committee (the present Speaker and the present Chairman of the Committee of Supply, Mr. Green) were in favour of the plan adopted by the House of Lords, and they submitted resolutions (published in the Appendix to the Report) for carrying out the plan in detail.

Their plan in substance proposed that the members of the *Standing Orders Committee* and *Committee on Petitions* should form a joint committee for receiving and deciding upon excuses of members desirous to be relieved from the necessity of serving on Private Bill Committees, with power to appoint five of their body as a Committee of Selection of Members to serve on Private Bill Committees: That after the names of the excused members had been set aside, the names of the remaining members of the House should be drawn by lot and printed with the votes in the order in which they were drawn: That the Committee of Selection should choose a chairman for each committee from the members of the Standing Orders Committee and Committee on Petitions, and the remaining members from the above list as nearly as might be in the order of their names, regard being had to the equal distribution of labour among the members, and to any alteration that might be rendered necessary by local connexion or personal interest. The committee on an opposed bill was to consist of five, and on an unopposed bill of three members, including the chair-

man. They were to sit de die in diem; their attendance to be compulsory, and no business was to be transacted unless all were present.[1]

On one point the Committee did agree in offering a recommendation, addressed rather to the Executive than to the House, viz. that steps should be immediately taken for improving the structure of the private bills themselves. This is a point which we look upon as scarcely of less importance than the constitution of the committee on the bill; for however perfect that constitution may be, and however desirous the committee may be of discharging its duties, and of sending the bill which has been referred to it back to the House in a perfect state, framed at once for effectuating the purposes of the promoters of the measure and protecting the interests of the rest of the community, yet unless the committee be furnished with some precedent or model of a well-drawn bill, adapted to the purpose in hand, it will be in vain that it will attempt satisfactorily to discharge this part of its duty.

We shall state in a subsequent part of this article the steps that were taken in pursuance of this recommendation. In the meantime we proceed with the subject of the constitution of the *Committee on the Bill.*

Pursuant to the recommendation contained in the Report last mentioned, the Committee on Private Business was re-appointed at the commencement of the following session (1839), and immediately took into its consideration the question of the constitution of the Committees upon Private Bills. The result of that deliberation was a Report submitting certain resolutions which were adopted by the House, the substance of which will presently be stated.

In their Report the Committee say—

"The proposal for excluding from the Committee on the Bill all members whose constituents might be locally interested was again

[1] If any plan of compulsory service of this kind should ever be adopted, it will deserve consideration whether, instead of having the names of members liable to serve all in one list, they might not be advantageously distributed into *panels* (suppose five, as under the Election Tribunal Act), the panels serving in rotation, one for each week. The members would thus feel themselves free from the risk of being called on to serve four weeks out of five. A suggestion to this effect was made by Mr. Estcourt in his evidence before the Select Committee.

discussed, and, as will appear by the Minutes of the Proceedings, was rejected by the majority of your Committee.

"Acting under this decision, your Committee proceeded to consider in what manner, with a due regard to the fair representation in any committee of the local interests, it might be possible to apply a remedy to some of the evils of the present system, to which the Report of last year bore testimony.

"The principal objections to the well-working of the committees at present, appear to be the great numbers of which they are composed, the practice of members voting without having heard the evidence, and the absence, on bills which are not strongly opposed, of any security that due attention will be given to their provisions by impartial members. To remedy these defects, it seems most desirable to combine, if possible, a reduction of the number of members on the committee generally, with the enforcement of a more constant and regular attendance on the part of those who are to serve; and to obtain, together with a due representation of local interests, some security for the attendance likewise of a certain number of impartial and disinterested members."—*Report, 25th Feb.* 1839, p. 1.

The substance of the resolutions submitted by them was as follows:—

"That it is expedient that new lists should be prepared under the direction of the Speaker, reducing considerably the number of members *above the line*, and omitting those *below the line*.

"That a Committee of Selection be appointed, consisting of the chairman of the Standing Orders Committee and the chairman of the Committee and sub-Committees on Petitions, three to be a quorum.

"That no member be allowed to attend or vote on any committee unless he have previously made a declaration (in a form to be prescribed by the Committee of Selection) of his willingness to serve throughout the proceedings.

"That any member not on the Speaker's list may apply to the Committee of Selection, alleging that his constituents have a local interest, and that he is willing to serve throughout the proceedings, and the Committee on being satisfied of such interest may, if they think fit, add his name to the list.

"That the Committee of Selection shall select and add to the list such number of members not locally interested, and in such proportions as the circumstances of each case shall in their judgment

render necessary, such members making a declaration of their willingness to serve throughout the proceedings."

In conformity with these resolutions the Committee of Selection prepared the form of declaration which was to be subscribed by each member and delivered by him to the committee clerk at the first meeting of the committee, before they had proceeded to appoint a chairman, in default of which he was not to be entitled to take any part in the proceedings of the committee.

The declaration of a member on the *Speaker's List* purported that he was willing to serve throughout the proceedings, and that he would never vote on any question without having duly heard and attended to the evidence relating thereto. The declaration of a member applying to be added to the committee, purported in addition to this that his constituents had *a local interest* in the bill; and that of the selected member, that his constituents had *no local interest*, and that he had no personal interest in the bill.

This form was approved by the House, and it was further provided that the Committee of Selection should in each case fix what number of selected members shall be a *quorum* of such members; and that the committee should in no case proceed without a *quorum* of selected members being present; and further, that the chairman should be chosen from among the selected members.

Thus the matter still stands with regard to the constitution of the committee on an opposed bill.

In the following session (1840) the Committee on Private Business was again appointed, and at the close of that session they made a further Report, repeating the condemnation that had been already pronounced on the constitution and practice of Committees on Private Bills prior to the session of 1839, a practice which they say had "had the effect of causing members to sanction or to appear to sanction proceedings of which they had no cognizance, and in unopposed private bills, of consigning to the promoters of the bill, without sufficient check, the framing of provisions by which the rights and property of absent parties and of the public might, and in all probability would, be materially affected."

This Committee did not, however, recommend any further

change in the constitution of the Committee on *opposed* Bills than had been adopted in the preceding session. But with regard to *unopposed* Bills, they referred to the practice long since resorted to by the House of Lords, by which "all unopposed private bills are subject to the vigilant and uniform investigation and correction of the Chairman of their Lordships' Committee," and they recommended that the House should appoint an individual to whose uniform, scrutinizing examination every unopposed private bill (not being a divorce bill) should be submitted, and who should also be the chairman of the committee on every such bill, and together with the members ordered to bring it in, should constitute the committee on such bill, the chairman and one of such members being the *quorum*. They suggested that the Chairman of the Committee of Supply would be the individual member to whom the House could most satisfactorily confide this duty, and they added, "that to facilitate his endeavours in every case thoroughly to investigate, and in many cases to submit corrections of the numerous private bills which would be laid before him, it would be expedient that he should receive the assistance of the officer appointed to prepare the breviates of private bills."—*Report*, 9th July, 1840, p. 4.

One other important suggestion was made by this Committee, viz. that the Committee of Selection should fix the time for the first sitting of the Committee on the Bill, and not the agents, as was formerly the case.

These recommendations were adopted by the House, and now form part of the Standing Orders.

From the foregoing sketch it will be apparent that the improvement in the mode of conducting the private business of the House, resulting from the labours of the Committees who have given their attention to this subject, are already very considerable. Instead of a large fluctuating body, avowedly acting as partisans, and often voting without having heard a word of the evidence, we have for the *Committee on the Petition* a small select body, possessing considerable practical experience, whose duty it is to try strictly the question of fact whether or not the Standing Orders have been complied with,

whilst, if their decision be against the promoters of the bill, there is a second select body, also having the advantage of experience, entrusted with the duty of advising the House, whether, upon an equitable consideration of the case, the standing orders so not complied with may be dispensed with. And for the *Committee on the Bill* we have, comparatively speaking, a small and select body, bound to hear the whole of the case or to abstain from voting, and of whom a portion at least, and one of those the chairman, are selected as being free from local interest.

The question, whether it is proper that local interest should be excluded from the Committee, is for the present decided in the negative; but the Committee, in coming to this conclusion, express themselves by no means confidently, and seem rather to suggest the plan which they have recommended as an experiment, than as what they look forward to as a final settlement of the question; and in the discussions which have since taken place in the House on Mr. Ewart's motions, the proposition of Mr. Ewart (which was substantially the same as that submitted in the Committee by Mr. Shaw Lefevre and Mr. Green) would seem to have been rejected rather on the ground that the experiment of the present plan had not had a fair trial, than that the House was satisfied that it was not capable of improvement.

It must be admitted that there is some difficulty in the question, and this difficulty seems to proceed from the mixed character of the committee, and the somewhat incongruous duties that it has to discharge. If its duties were merely of a judicial character, it would probably be at once conceded that the constitution of the committee ought to be assimilated to that of a judicial tribunal. But its duties are of an inquisitorial and legislative, as well as of a judicial character, and it has been considered, therefore, by some persons, that the committee should be of a miscellaneous character, so as in some sort to represent in little the House of Commons. Considered as a legislative body, members locally informed and locally interested would naturally form consistent parts of it; and from the conflict of their opinions and arguments, and a comparison of their information on the subject, its conclusions would be formed. This is the case, it is urged, in the House

itself, where the matter is determined by deliberation and argument, each member presenting his own views, and bringing his quota of information; and it is insisted that something of the same kind should take place in the committee. Moreover it is urged, that in a matter affecting their immediate interests, the constituents have a right to the services of their representatives. Local interest, it is said, is confessedly and constitutionally brought to bear in the House itself, and therefore ought not to be excluded from the Committees; and if it be, the only consequence will be, that it will be transferred to the House.

Considering the functions now in practice discharged by the Committee on the Bill, it must be admitted that these arguments are not without weight. The Committee on the Bill is no longer confined to that which is its legitimate province, viz. to examine in detail the provisions of the bill: it has in practice usurped what ought to be the province of the House at the second reading, viz. to agree or disagree to the *principle* of the proposed measure, and with that to decide the fate of the bill. This is done under the form of voting the *preamble.* Formerly the House used itself to inquire into the truth of the preamble, and to hear counsel at the bar upon the second reading. Having thus satisfied itself as to the principle of the measure, the bill was sent to the committee to examine the details. This inquiry at the bar of the House, with the increase of private business became impracticable, and the House adopted the practice of sending the bill to the committee, both upon the preamble and the details. The theory seems to be, that the House, in going to the second reading, admits the principle of the bill, viz. that it is expedient that the measure should become law, provided that the facts recited in the preamble be true; to borrow an untranslateable phrase from the courts of law, it reads the bill a second time *de bene esse,* referring it to the committee to inquire whether a case has been made out. Accordingly, the first step in the committee is to inquire into the truth of the preamble, and here takes place the great struggle for the fate of the bill. Now, as the preamble amounts in substance to an allegation *that it is expedient that the proposed measure should become law;* and as it is nowhere ascertained what are the facts that de-

termine that expediency, the committee has no other guide than its own discretion; and the whole question of the expediency of the measure, in other words, the principle of the bill, is open to the committee in as ample a manner as it is to the House upon the second reading. One is not surprised therefore that persons should refuse to treat a question of this large nature as a mere judicial inquiry, and should object to the committee being constituted on that footing.

It is worth consideration, whether, by a different distribution of the respective duties of the House and of the Committee, the difficulty which we have adverted to may be got rid of.

The House ought undoubtedly itself to decide on the principle of the bill; and regularly it would do this at the second reading of the bill. Why does it not do so? Simply because being matter of a local nature, the House is not in possession of the facts necessary to enable it to come to a satisfactory conclusion as to the expediency of the proposed measure, and it is necessary to have those facts ascertained through the medium of a committee.

It was to inquire into facts of this nature that the *Committee on the Petition* was originally instituted. They are the facts stated in the petition (or which ought to be stated in the petition) as justifying the introduction of the bill, and which are to constitute the preamble of the bill when introduced; and until the late changes it was the practice of the Committee on the Petition, nominally at least, to inquire into the truth of those facts. The inquiry was however conducted *ex parte*, and in a very imperfect manner, and no reliance was placed by the House on what they did in this respect; it was considered that the standing orders were their peculiar province, and that the inquiry into the preamble belonged to the *Committee on the Bill.*

How it came to be considered that the Committee on the Bill was a more appropriate tribunal for inquiring into the truth of the preamble than the Committee on the Petition (unless it be that the proceedings of the latter were ex parte, whilst opposing parties were allowed to be heard before the Committee on the bill), it is difficult to say. The inquiries

are certainly such as ought to take place before the second reading, and naturally therefore they would be the province of the *Committee on the Petition.* They are in fact to lay the foundation for the bill.

If the House were able to define beforehand with reference to each kind of bill what facts should be considered as justifying the second reading, or, in other words, as establishing the policy of the bill, then the functions of the committee to whom they are intrusted, whichever it be, would be very similar to those at preseut discharged by the *Committee on the Petition.* Their duty would be simply to inquire strictly upon the evidence, whether the facts in question are proved.

If these facts cannot be defined beforehand, (and with regard to some kinds of bills this probably is the case,) then a middle course might be adopted, viz. to require the committee to report specially the facts proved before it, which in its opinion justify or do not justify the second reading.

If the finding of this committee should be adverse to the further progress of the bill, the matter might be referred to the *Standing Orders Committee,* or some other body of a like nature, (if it be thought desirable to have this kind of review,) for their opinion upon the facts so found, just as the like reference is now made in the event of its being found that the Standing Orders have not been complied with.

It is observable that, with regard to some kinds of bills, the House is now in the practice of requiring the *Committee on the Bill* to inquire into certain facts, and to report them specially to the House. With regard to Railway Bills, for instance, the committee upon the bill is to report specially to the House, amongst other things, the amount of shares subscribed for, and the deposits paid thereon; the number of shares and the amount of capital subscribed by parties having local interests in the line, and the amount of capital subscribed by other parties; also the sufficiency or insufficiency of the present means of conveyance between the proposed termini; the number of passengers and quantity of goods expected on the railway, and the amount of income looked for; also whether there are competing lines, and what are their comparative merits, and some others.

Now these are precisely inquiries of the nature of those which we have suggested as proper to be made before the second reading. In the same way as these topics of inquiry have been prepared, as special instructions to the Committee on a Railway Bill, it would probably be found practicable to define the points of inquiry proper to be made previously to the second reading of most kinds of bills. But whether upon points previously defined or not, we think that whatever inquiry is to be had into the truth of the preamble should take place *before the second reading*, and that the committee should report the facts to the House, with its opinion.

The House being in possession of these facts, and having the benefit of the opinion of the committee, (the value of which would be much enhanced from knowing upon what facts the conclusions had been formed,) it would then, with the assistance to be derived from the breviate, be in a condition to dispose satisfactorily of the question of the second reading of the bill; and the principle of the bill being thus really and substantially decided by the House at the second reading, much of the objection which has been felt to constituting the committee on the bill, as well as that on the petition, upon the footing of a judicial tribunal, would, we think, be removed.

With regard to the sort of constitutional objection that is felt to excluding *local interest*, and the principle of *representation*, from these committees, it must always be borne in mind that the circumstances of public and private legislation are widely different. The promoters of a private bill are pursuing an object of their own; they are seeking to legislate for a given locality, or for a given body of individuals, it may be at the expense of the rest of the community: whereas in the ordinary legislation of the country the bills are brought into the House not with any individual or local object, but for the public benefit. It may be proper to put a check upon the exercise of local influence with regard to these private speculations, which is not required in transacting the ordinary legislation of the country; and though it be true that local interest is confessedly and constitutionally brought to bear in the House, that is no reason why it should be allowed to prevail in the committee. In the House it is an unavoidable evil. It is there, however, comparatively of small amount,

and the very circumstance that the House is liable to be unduly influenced by members locally interested, is a strong reason why the House would desire to avail itself of the assistance of a committee free from the bias of local interest; and where the House has had an opportunity of informing itself through the agency of a disinterested committee in which it has confidence, it is almost invariably found that the majority of the House are disposed to support the conclusions of such a committee against the most strenuous exertions of local interest.

Supposing the second reading to have been disposed of in the way we have suggested, the duties of the Committee on the Bill would be confined to an examination of the details or provisions of the bill. We proceed now to the consideration of this part of their task.

The House having allowed the bill to be read a second time, it must be assumed that the measure is one generally to be sanctioned; and the question then presents itself, upon what conditions, and subject to what limitations, are the powers proposed to be conferred by the bill to be granted. Here the committee has frequently a twofold duty. In many cases private parties appear before the committee insisting on the insertion of clauses for their individual protection; this is one branch of their duties. But whether such parties appear or not, the interests of the public generally, and of absent parties more immediately affected by the measure, are to be protected. This is the second, and commonly the most important branch of their duties; but it is one that, until very recently, has been very much neglected, and but for the vigilance exercised in the House of Lords by the chairman of their lordships' committees, as mentioned in the Report of the Committee last cited, the interests of the public must have suffered to an incalculable extent.

In the task of adjusting questions between the promoters of the bill, and parties appearing before the committee to insist on individual protection, the functions of the committee are very much in the nature of those of an arbitrator, and for the decision of questions of this kind a select committee, free from bias of any kind, would seem the fittest tribunal.

The other branch of their duties, the protection of the public generally, involves the general revision of the bill. What the committee has to do is, to see that while the bill confers the powers requisite for the undertaking which it authorizes, it confers no further powers than are requisite, and that at the same time the interests of the public and of individuals are protected. It is, in short, in the technica language of conveyancers, *to settle the bill on behalf of the public.*

How is the committee to be enabled adequately to discharge this duty?

The first thing to be done is to have it ascertained in some way what are the provisions proper to be inserted in the several kinds of Private Bills, and then to take means to ensure their being inserted in each case. To some extent this is provided for by standing orders, requiring certain clauses to be contained in certain bills. But this extends but a little way. It might however be carried to a much greater extent, either by means of Standard Forms for every kind of bill (so far as the bills can be reduced to classes), sanctioned by the House, and required to be followed in the case of every new bill brought in, except in so far as cause should be shown before the committee for departing from the standard form, or by means of General Acts, embodying the provisions now introduced into the Private Acts, so far as they are of a general nature, and which might be incorporated in each case with the Private Acts. The discretion of the committee would then require to be exercised only with regard to any bills of a novel character, and not falling under any class, and also with regard to matters necessarily special in each bill, such, for instance, as the amount of tolls to be authorized for any given undertaking, and the like.

This subject did not escape the attention of the committees whose labours we are considering. We have already mentioned that the Committee of 1838 concurred in a recommendation, having for its object an improvement in the structure of Private Bills.

The following is the recommendation to which we refer:

"Your Committee suggest that the interval of the recess might

be employed with great advantage in inquiring into the state of legislation in respect to the private business of the country, and preparing the materials for the future consideration of the House.

"With a view to that object, they recommend the employment by the government of some competent professional persons, who shall classify the private business, and prepare drafts of general bills to be submitted to the legislature at the commencement of the next session, as the form of general enactments under each head.—*Report, August* 4, 1838, p. 4.

It appears that the government adopted this recommendation, and applied to Mr. Booth and Mr. Symonds (a member we believe of one of the Inns of Court, and at that time holding the office of Private Secretary to the president of the Board of Trade) to prepare the drafts of bills in conformity therewith. Certain bills were accordingly prepared by Mr. Booth with the assistance of Mr. Symonds; but owing to some difference of opinion as to the frame of the bills, Mr. Symonds, it appears, was not able to concur in recommending their adoption, and they were consequently submitted by Mr. Booth alone, together with a letter addressed to the President of the Board of Trade (the chairman of the Select Committee), explanatory of the plan upon which they had been prepared.

The bills so prepared consisted of,—

A General Inclosure Bill.
A General Railway Bill.
A Joint Stock Company Bill.
A Lands Acquisition Bill.
A General Companies' Suitors Bill.
A Commissioners of Public Undertakings Bill.

These bills it was proposed should be passed into laws.

Mr. Booth also submitted forms or precedents of *Private Bills* (or, as for convenience he called them, *Special Bills*) showing the mode in which it was proposed to incorporate the private with the general act, so as to make the provisions of the latter applicable to individual undertakings.

He gives the following explanation of the plan of the bills submitted by him:—

"The plan of these bills, and the manner in which they are calculated to effect what I conceive to have been the object of the Select Committee, will be best explained by a short reference to the

existing practice of the legislature with regard to the private business.

"In every session of parliament a greater or less number of bills is introduced relating to various classes of undertakings, such as inclosures, railways, canals, docks, harbours, bridges, cemeteries, town improvements, gass and water works, and some others.

"Each of these bills contains within itself, set out at a great length, all the provisions applicable to an undertaking of the class to which it belongs, although the greater part of these provisions have not more application to the individual undertaking than to any other undertaking of the same class.

"The inconvenience of this method of framing the bills is, that much unnecessary labour and responsibility are imposed on the committee of the House which may have to sit upon the bill, and much unnecessary expense is incurred by the promoters of the bill. Although the provisions properly applicable to an undertaking of the class in hand may have been already considered and settled, in committees on other bills, a hundred times, the committee has thrown upon it, in each instance, the labour and responsibility of going carefully through the bill, in order to ascertain that all the proper provisions are introduced into it. And as the promoters of the bill are, naturally, more anxious to secure to the party having the conduct of the undertaking as large a measure as possible of the powers sought by the bill, than careful to see that the exercise of those powers is guarded by provisions framed with a due regard to the interests of the public, it is obvious, that if the committee do not discharge its duty by watching the bill with great diligence and jealousy, the interests of the public will, in many instances, materially suffer.

"With a view to obviate this inconvenience, it seemed to me that two objects were mainly to be aimed at:—

"1. To provide means for insuring the introduction of the proper provisions into each private bill, without imposing more labour on the committee than the special circumstances of each bill rendered unavoidable; and

"2. To diminish the expense arising from the present extreme length of the bills.

"The first of these objects might be attained by getting together all the provisions proper to be introduced into a bill applicable to an undertaking of any given class, and (the legislature having once maturely considered these provisions and approved of them as applicable to the undertaking in question) by requiring them to form part of every bill authorising an undertaking of that class, unless

in any individual instance special cause was shown for departing from them.

"This object is already to some extent attained (but in a very imperfect measure) by means of Standing Orders of the two Houses of Parliament requiring certain clauses to be inserted in certain private bills, and by the vigilance of the chairman of committees of the House of Lords, who is, I understand, in the habit of requiring that when certain provisions have been once approved of by the legislature as applicable to certain objects, the language of those provitions should be adhered to in bills subsequently introduced. But even supposing this plan perfectly carried out by framing a complete scheme of provisions applicable to each class of bills, and requiring them to be constantly introduced into every bill of that class, unless where special cause were shown to the contrary, this method would still be open to objection on the score of the expense occasioned by the great length of the bills.

"The method which appeared to me best calculated to attain both the objects above adverted to, was, in the case of each class of undertakings, to throw together into a general bill (so framed as to admit of incorporation with any private bill to be afterwards passed) all the provisions properly applicable to an undertaking of that class, and having passed this general bill into a law, to require the private bill authorising any undertaking of that class to be confined to a mere indication of the powers proposed to be given by it, leaving the exercise of those powers to be regulated by the provisions of the general act.

"The attention of the legislature would thus in each case be directed solely to that which is peculiar to the individual undertaking, instead of being, as now, exhausted upon a great number of provisions common to it with all others of the same kind. If in any instance the provisions of the general act were proposed to be departed from, the committee sitting on the bill would require a special case to be made, justifying such a departure."

Mr. Booth then, by way of illustration, instances the case of an *Inclosure Bill.*[1]

"An Inclosure Bill affords the most simple example of the evil of the present system and of the remedy which I propose.

[1] Mr. Booth does not advert to the fact, that there are already two General Inclosure Acts. They are, however, so very imperfect, that the Private Inclosure Bills, of which nineteen or twenty are passed every session, are scarcely diminished in length in consequence of the existence of the general acts.

"If an ordinary Inclosure Bill be examined, it will be found to consist almost entirely of provisions, which, with more or less variety of phraseology, are common to all inclosure bills. What is peculiar to the individual inclosure consists of little more than an indication of the lands to be inclosed,—the names of the commissioners,—their stipends,—the places of meeting,—the mode in which the expenses of the inclosure are to be raised,—a direction for making certain specified allotments,—and a few other matters. Nearly all the rest of the bill is applicable to inclosures in general.

"I have therefore thrown together in one bill, which I call 'The General Inclosure Act, 1839,' all the provisions applicable to inclosures in general; and, in the form which I have prepared of a Special Inclosure Bill, I have shown the method in which it is proposed that the provisions of the General Act should be applied to the individual inclosure.

"The Special Bill declares that the General Act is to be incorporated with it, and then makes provision for the several matters which I have already noticed as peculiar to the individual inclosure. This Bill (as well as the other forms of special bills) is framed on the supposition, that the Standing Orders requiring the insertion of certain specified clauses into private bills will be dispensed with, the object of those clauses being attained by comprising the clauses in question in the General Act.

"The General and Special Bill being framed upon this scheme, the Special Bill will not ordinarily require to be of greater length than the breviate of a private bill of the same class, prepared according to the practice of the last session."

Next follows the case of a *Railway Bill:*

"A Railway Bill is of a more complex nature. The observation above made with regard to an ordinary Inclosure Bill is applicable to an ordinary Railway Bill, with this additional observation, that in the Railway Bill not only is the great majority of the provisions contained in it common to all Railway Bills (and which might therefore be formed into a General Railway Bill upon the same plan as the General Inclosure Bill), but, of those provisions, two large groups are common not only to all railway bills, but to all bills authorizing the execution of any undertaking by means of a joint stock company, or in which power is given to acquire lands for the purposes of the undertaking.

"These two groups of provisions being applicable to several other classes of undertakings, as well as to railways, and being capable of being separated from the other provisions of the railway

bill, I have thrown each of these groups into a separate bill, of a kind still more general than the General Railway Bill. The one contains all the provisions applicable to the constitution and proceedings of a joint stock company, and this I call 'The Joint Stock Companies Act, 1839;' the other contains all the provisions applicable to the acquisition of the lands required for any undertaking authorized by Parliament, and this I call 'The Lands Acquisition Act, 1839.'

"The General Railway Bill, therefore, contains all the provisions common to railway undertakings, except those for the regulation of the company and for the acquisition of the lands required for the undertaking.

"The Special Railway Bill incorporates with itself not only the General Railway Bill, but the Companies and the Lands Acquisition Bills also; and the effect is the same, therefore, as if the provisions of those bills were repeated at length in the Special Railway Bill.

"The form of the Special Railway Bill is intended to show the method in which this is proposed to be done, and in which the provisions of those bills are made applicable to an individual undertaking."

The *Commissioners of Public Undertakings Bill* was intended to be applicable to such undertakings as are carried into execution by a body of commissioners instead of by a company.

Supposing the scheme upon which the General Railway Bill had been prepared to have been approved, Mr. Booth proposed that a General Bill of a similar character should be prepared, applicable to each of the several other classes of public undertakings, such as harbours, docks, canals, markets, cemeteries, gas lighting, waterworks, town improvements, and any other undertakings of a public nature, which experience might show to be the object of such frequent application to Parliament as to be the fit subject of a general act.

A difference of opinion having subsisted between Mr. Booth and Mr. Symonds,[1] the bills which had so been prepared,

[1] The main difference in opinion between Mr. Booth and Mr. Symonds would appear to be that Mr. Symonds was in favour of a much greater subdivision of the subject-matter of the General Bills than Mr. Booth thought it prudent to recommend. Mr. Symonds does not, in his letter to the President of the Board of Trade, explain himself on this head, but he refers to certain papers presented to Parliament in the preceding Session, in which his views are contained. From those papers it is to be collected, that a private Railway Act (to take that as an instance),

together with the letters of those gentlemen, were submitted to the late Mr. Tyrrell for his advice as to the course most desirable to be pursued, and Mr. Tyrrell accordingly explained his views in a letter printed in the appendix to the Report last referred to, and was also examined at some length before the committee. Mr. Tyrrell entirely approved of the design of passing General Acts, but he thought that the attempt at improvement had not been carried far enough. In determining the materials for his General Acts, Mr. Booth had, as he says in his Letter, not felt himself at liberty to do otherwise than adopt the provisions commonly found in the more recent private acts of the same class. Mr. Tyrrell, however, thought it not enough to generalise the provisions now commonly contained in the private bills: the provisions themselves he considered in many respects defective or objectionable, and he recommended that the whole subject should undergo revision, and that the work should be executed by three conveyancers, with the assistance of an equity lawyer and common law barrister, under the direction and sanction of a joint committee of the two Houses of Parliament, or of a commission of which influential members of both Houses should be members.

Some difficulty seems to have been experienced as to the adoption of Mr. Tyrrell's recommendation, and no further step has yet been taken by the House in this direction.

But although no further step has been publicly or directly taken with regard to the proposed improvement in the private bills, the materials which had been thus got together have by no means been suffered to lie idle. This is very apparent in the improved structure of the private bills of the present day. The contrast between the private bills of a few years back, and those of the last session, is very striking. The bill formerly, as presented to the House, was, with some slight exceptions, where the wholesome supervision of the chairman of committees in the House of Lords was to be traced, an undigested mass of clauses thrown together without order or plan: you

instead of being compounded of three General Acts, viz. a Joint-Stock Company's Act, a Lands Acquisition Act, and a General Railway Act, as proposed by Mr. Booth, would, according to Mr. Symonds's scheme, be compounded of at least twenty general acts."—*See Papers relating to the Drawing of Acts of Parliament*, pp. 51, 52.

knew not where to find any thing, and when you supposed you had found it, you were never sure that twenty or a hundred clauses off there was not another set of provisions relating to the same matter. The clauses themselves were very commonly more than a folio page in length, sometimes extending to two or three pages; abounding in tautology; and the same clause perhaps embracing half a dozen matters that ought to be distinct enactments.

Now at least the bills are readable. The main divisions of the bill are distinctly marked; the clauses of the subordinate divisions are grouped in a natural order, the clauses themselves are broken up so as to be of moderate length, and confined to one matter; tautology is excluded, and something like precision of language is attained. In addition to this, the clauses of bills of the same kind are uniformly arranged in the same order, and there is a fly-leaf attached to the bill in the nature of a table of contents, showing the arrangement of the clauses. If you wish to find a clause, you know where to look for it; if you wish to introduce a clause, you know where to insert it.

This change has been brought about tacitly and without any order of the House or recommendation of a committee, so far as we have been able to discover. It is, we believe, the work of Mr. Booth and Mr. Palk (the counsel to the chairman of committees of the House of Lords), who have in conjunction prepared a set of precedents of the several kinds of bills in most common use, availing themselves (with some modification) of the bills which had been prepared by Mr. Booth as before mentioned, so far as those bills extended. These bills have been printed by the printers to the House of Commons, and they have, as we understand, been furnished to the parliamentary agents under the sanction of the chairman of committees of the House of Lords.

The precedents in question are known about the Houses of Parliament by the name of the *Model Bills*, and they are adopted by the agents, not pursuant to any standing order or resolution of the House, but from an understanding on their part, that when they get into committee they will, if not in the Commons at least in the Lords, be called upon to explain why their bill is not in conformity with the precedent; and if

they are unable to give a satisfactory reason for their departure, that they will be required to print their bill anew.

We think it a great step in the way of improvement that the House has arrived at the point of requiring the private bills to be drawn according to given precedents, however irregularly or imperfectly this may be accomplished. But we think the House cannot let the matter rest on its present unauthorized footing. It must, we think, take steps to have the precedents brought into as perfect a state as can conveniently be attained, and then, having satisfied itself that the precedents are such as ought in ordinary cases to be followed, it ought, we think, in a formal manner to require their adoption. We do not mean that the House should by a standing order require, that the bills should invariably be drawn according to the given precedents; to this there are obvious objections, but we think the House might reasonably require that every private bill, in so far as it departed from the given precedent, should on the face of it show the departure either by a different type or in some other manner. The committee ought to be able to see at a glance which of the provisions in the bill before them are in conformity with what has been before approved in the like cases, and how much is new. Quite enough to do will the committee have if they have only to look at what is special to each bill; and in order to be able to do this, the bill ought to be so printed that what is special or new should at once catch the eye.

Supposing these precedents perfected and sanctioned by the House in the way that we have suggested, and the new or special matter in each printed in a different type, it would soon become apparent how much there is of *common form* in all these bills, and then it could, we think, hardly fail to be evident that it cannot be necessary to reprint at length the whole of this common form in every private bill that is brought in, but that the matter common to them all might be thrown into the form of general acts, and so by reference be made available for the objects of the private acts.

That what is now doing must ultimately result in the introduction of general acts, something in the nature of those recommended by Mr. Booth, we feel no doubt; and we do not think that the delay which will have occurred will be at all to

be regretted, because we quite agree with Mr. Tyrrell that it is not desirable that the general acts should be passed until the provisions proper to be inserted in each are brought into a more perfect state than at present, and we know no method more likely to conduce to their perfection than the plan of having authorised precedents which *primâ facie* the parties are required to use, but open to correction each year as experience may show their imperfections.

By means of the standard bills, criticism may be brought to a focus; imperfections discovered, may be corrected once and for ever. If any of the bills are found not to work well, the parliamentary agents are pretty sure to hear of the defect, and in a subsequent bill the necessary alterations may be made, and the model bills may be corrected. If at the close of each session the model bills be corrected upon suggestions furnished by the experience of the preceding session, or occasionally at other periods, they must, in the course of a few years, arrive at such a degree of perfection as would justify the legislature in throwing them into the shape of general acts.

There still remains the question, with regard to proposed departures from the authorised precedents, whether an unlimited discretion is to be vested in the Committee on the Bill. Perhaps some plan might be adopted for making them, subject to the revision of a select committee, something analogous to the Standing Orders' Committee, of which committee the chairman of the Committee of Supply should be the chairman.

All bills of a novel character, that is, not falling within any of the classes for which precedents were provided, might also be required to be subjected to the revision of this committee.

The experience which the chairman of this committee must necessarily acquire in the course of the discharge of his duties, and his familiarity with all the existing forms of bills, must peculiarly qualify him for exercising a supervision of this kind, and he would no doubt in all necessary cases feel it his duty to communicate with the government departments within whose province it might lie to judge of the policy of any proposed new scheme or undertaking of general interest.

With regard to *special* matters in each bill, in which the public may be supposed to have an interest, it is difficult to point out any method in which they can be quite satisfactorily

disposed of. But at least we think a select committee of indifferent persons, few in number, chosen, we will suppose, in some sort with reference to their qualification for judging of the matters referred to them, would be more satisfactory than a larger and more promiscuous body, and one not altogether free from the bias of local interest.

We will conclude this article, which has already extended to an unreasonable length, with a passage from the *Leviathan*, upon the Composition of Laws, which we commend to the consideration, as well of the framers of the law as of those who are engaged in its interpretation.

"Perspicuity consisteth not so much in the words of the law itself, as in the declaration of the causes and motives for which it was made. That is it that shows us the meaning of the legislator; and the meaning of the legislator known, the law is more easily understood by few than many words. For all words are subject to ambiguity; and therefore multiplication of words in the body of the law is multiplication of ambiguity. Besides, it seems to imply (by too much diligence) that whosoever can evade the words, is without the compass of the law. And this is a cause of many unnecessary processes. For when I consider how short were the laws of ancient times, and how they grew by degrees still longer, methinks I see a contention between the penners and the pleaders of the law; the former seeking to circumscribe the latter, and the latter to evade their circumscriptions, and that the pleaders have got the victory. It belongeth, therefore, to the office of legislator (such as is in all commonwealths the supreme representative, be it one man or an assembly) to make the reason perspicuous why the law was made; and the body of the law itself as short, but in as proper and significant terms as may be."—*Lev.* p. 182.

ART. X.—REMOVAL OF THE COURTS FROM WESTMINSTER.

Report from the Select Committee on Courts of Law and Equity; together with the Minutes of Evidence, Appendix, and Index. Ordered by the House of Commons to be Printed, 22nd July, 1842.

Dr. Johnson once boasted that he could repeat a whole chapter from "The Natural History of Iceland," by a Danish author (Horrebow), though he had only read it once. The chapter was, "Chap. 72. Concerning Snakes:" and runs thus, "There are no snakes to be met with throughout the whole island." Any one might make the same boast regarding this Report, which consists of three lines and a half to the effect that the Committee had agreed to make no report at all beyond the printing of the Evidence. We are far from blaming them on this account. The question is not one on which the House or the public would be led by authority, or one requiring a preliminary dissertation to make it intelligible. Its entire merits may be collected from the evidence, and the first thing that strikes a careful reader is the manner in which the advocates for change persist in weakening their case by forcing the doubtful and incidental considerations into the foreground of the argument.

The advantages to be expected from a simple change of situation, will probably not be deemed sufficient to justify the expense of a removal; but everybody admits that the present accommodation is glaringly insufficient, and that the speedy transaction of business is rendered hopeless by the separation of the Courts from one another and the offices. No patching or stretching will remedy the evil. The Courts must be pulled down and built up on an entirely new plan somewhere. The vicinity of Westminster Hall does not afford space for the purpose, and there is consequently no alternative but to select one of the proposed sites in the centre of the metropolis.

Each of these propositions may be proved unanswerably. We shall begin by proving the insufficiency of the existing arrangements.

A court of justice should afford full accommodation for all parties directly or indirectly concerned or interested in the administration of justice—for the judges, counsel, attornies,

witnesses, jurymen, short-hand writers, and the public, who may be regarded in some sort as represented by the reporters for the newspapers.

The judges are always considered first, and, go where they will, are able to take the lion's share of such comforts as are to be had, but even they might complain occasionally of having to sit in small courts like the Bail Court and the Exchequer Chamber, or a court not properly belonging to them like the Sessions House, and we should think they would not be sorry to have a good library set apart for the bench.

What counsel want is, more space for shifting their costume, a spacious coffee-room common to all branches of the bar, consultation rooms, and a good law library. We may add, as a matter in which they are principally concerned, that it is difficult to hear what is going on from the back rows of the Queen's Bench; and that the desks, in the back rows of all the courts, are framed in such a manner as to render it extremely awkward to write on them, though a junior counsel is expected to take an accurate note of every syllable that is uttered by the witness or the judge.

The floor of the court is the only place where the attornies and their clerks can find a resting-place, and as there is hardly room enough for a third of those necessarily in attendance, they are wretchedly cramped and cannot quit their seats a moment for fear of losing them. As for consulting their papers, or holding communication with one another, this is quite out of the question.

The parties, jurymen and witnesses must stow themselves where they can, and we know no more pitiable or (in one sense) disgraceful sight than to see the hardships they endure sometimes for four or five days running. Our only wonder is that the sense of responsibility is strong enough to induce so good an attendance; and there can be no doubt that many jurymen stay away at all hazards, and many valuable witnesses decline volunteering their evidence, in consequence of the utter want of accommodation in the courts. The best of us are swayed by a regard for our personal comfort to an extent far exceeding what we may be willing to allow.

The reporters are generally driven to take refuge in the student's box (seldom more than four-feet square), and the public

crowd the passages to the great inconvenience of all who have occasion to pass, or occupy part of the space set apart for counsel, which they think it extremely hard to be obliged to give up, though surely, to grudge a briefless barrister his seat, is about as reasonable as to grudge an unemployed cab-driver his stand.

Members from each branch of the profession may be cited to confirm this statement.

Mr. M. D. Hill, Q.C. :—

"With respect to the courts themselves, as now situated, what is the degree of convenience and accommodation which they afford with respect to the amount of room for the bar, for solicitors, for witnesses, and other purposes connected with the administration of justice?—Very insufficient; insufficient to a degree which can hardly be believed by those who are not conversant with the courts; I have very often myself had to hold consultations in the passage of the room between the robing-room and the coffee-room of the Court of Queen's Bench, for want of any accommodation in a private room.

"Is the Court of Queen's Bench sufficiently spacious to admit of the bar and the public, with convenience, as it now exists?—The Court of Queen's Bench is sufficient for the bar, or nearly so, I should think, but very insufficient for the public; because there are cases in that court, as honourable members well know, which excite great public attention, and at such times a very small fraction of the public can gain admittance.

"Is there any part of the court applied to the use of the public exclusively, or do the public occupy the passages which lead to the counsels' seats?—The public occupy the passages, to the very great inconvenience of the bar; and the solicitors and their clerks in attendance occupy the passages also, to the inconvenience of the bar, and to their own inconvenience, they having no other place which they can occupy.

"Are the spaces in the court not occupied by the bar sufficiently large for the convenient accommodation of the solicitors and their clerks alone, independently of the public attending from curiosity during the time of general business?—Certainly not.

* * *

"Are the solicitors exposed to great inconvenience in respect of their papers and other circumstances, from want of a room set apart for them while in necessary attendance?—I should think the greatest possible inconvenience.

"Is there also any considerable inconvenience from want of a proper and easy communication between the bar and solicitors?—

Yes, there are all the inconveniences which can arise from the overcrowded state of the courts; it is well known that the architect, the late Mr. Soane, who erected those courts, felt himself very much cramped for space; and all the inconveniences which can arise from such a limited space do arise, perhaps, in a greater degree than either he or any one else at the time contemplated, partly from the great increase in the number of practitioners both at the bar and among the attorneys. I judge of that very much from the increase on my own circuit, where the numbers have doubled since I joined that circuit in the year 1820.

"Is the robing-room of the Court of Queen's Bench much crowded?—The robing-room is crowded, as the newspapers say, to suffocation, occasionally; and the opportunities which the keeper of the robes has of giving accommodation to the gentlemen of the bar, with respect to their gowns and wigs, and the clothing they take off to put on their court dress, are inconvenient in the Court of Queen's Bench to the very last degree.

"There is only one small room where consultations can be held in the Court of Queen's Bench?—There is one small room appropriated to consultations; and by the permission of the officers of the court, we sometimes obtain admittance to a room which belongs to some of them; but except as to those two rooms, we are obliged to hold consultations in the passages and avenues of the court."

Mr. Erle, Q.C.:—

"Does it appear to you that it would be a material convenience if libraries were attached to the different courts?—I think the want of a good professional library is felt by almost every member of the profession; it would be a great convenience if a good library were established.

"Is much inconvenience now felt for want of suitable rooms for consultations in the neighbourhood of the courts?—Yes, very great; I have known several clients assembled together, waiting for consultation, and there was only one room for the members of the Queen's Bench bar to meet their clients.

"That room is a small room attached to the robing-room, is it not?—It is a small dark room attached to the robing-room. I have known consultations held frequently in the different passages in the neighbourhood of the courts.

"Has it fallen within your experience, that any inconvenience and delay occur from the difficulty of witnesses coming into court when called?—Some delay occurs, and I should think, in many instances, *a witness is a good deal embarrassed by the difficulty he has felt, and the pressure he has felt in getting to the witness-box.*"

Mr. S. Martin:—

"Do you think there would be any considerable saving of time, and increased convenience, if there was also the accommodation of a library for counsel to answer cases while in attendance on the courts?—Upon that point I should say that is the great difficulty we labour under here. There is but one room at Westminster, and persons use that room for reading newspapers and for conversation, and I have always found it myself utterly impossible to do business there; *and as there is no place where business can be done, probably Westminster Hall is, during the day, the idlest place to be found;* the loss of time is enormous, and every one finds it and complains of it. I should say, that if we had rooms at Westminster where it was understood that persons were to be quiet, that would, so far as we are concerned, do away in a great measure the necessity of removal to Lincoln's Inn; but the great defect in the present state of things is a total inability to do any thing satisfactorily during the course of the day."

The profession ought to be much obliged to Mr. Martin for boldly stating the great truth we have printed in italics. We go yet further, and do not hesitate to say, that there is hardly any mode of life so injurious to the mental powers as that pursued by the unoccupied frequenters of Mr. Howard's robing-room. A barrister must attend the courts often enough to feel at home in the atmosphere and become familiar with the forms, but he must possess more force of mind than falls to the lot of many, if he can repair thither daily for a series of years without contracting an incurable habit of idleness and an utter incapacity for sustained exertion of any kind. There is no waste of time so mischievous as that which wears the semblance of occupation or receives the sanction of authority.

This evil would be partly remedied by such increased accommodation as would enable the occupied men to write and read without interruption, and it would be remedied entirely by placing the courts in the immediate vicinity of the Temple and Lincoln's Inn, where few but professed idlers would be found in the waiting rooms. We again refer to Mr. Hill:

"Is much inconvenience felt by the bar for want of a law library, conveniently situated for use in the courts?—Very considerable inconvenience; and that leads me to refer to an evil which can hardly be over estimated, which is this: that owing to the want of a library,

properly so termed, added to the distance between the courts and chambers, much time is spent by the bar in absolute idleness, which might otherwise be well employed if they had a place where they could have access to books, and where they could use their papers with comfort to themselves.

"Do you think any considerable business might be done in the way of answering cases and advising solicitors, if there was the convenience of a library and rooms to confer with solicitors?—I do; and I think that with proper accommodations, as regards books and places of study, either adjoining the courts or nigh at hand, as chambers would be, if the courts were brought up towards Lincoln's Inn, the majority of the members of the bar would be enabled to get through their business in the morning, and that the necessity for late hours at chambers would be almost done away with.

"Can you state whether, in the case of an argument of any importance and complication, counsel are under the necessity of taking down a considerable quantity of books from their chambers?—*I think I have seen the honourable chairman* (Sir T. Wilde) *followed by two hackney coach loads of books from his chambers*, and I have filled one hackney coach myself."

Mr. Faulkner (of the firm of Adlington & Co.)—

"Is there any accommodation at Westminster for jurymen or witnesses?—No; nor for solicitors, who have to scramble for a seat with all classes of persons.

"Where do the witnesses generally remain?—Generally at one of the taverns in the neighbourhood.

"Is that attended with expense?—Yes, at the expense of the party."

Mr. Thomas Clarke (of the firm of Clarke, Fryermore, and Flodgate):—

"With respect to the courts themselves, is there sufficient space and convenience for solicitors who have to attend the courts?—I think nothing can be more inconvenient. I think if it had been studied to make them inconvenient, it could not be more effectually done.

"Is want of space one of the causes for that?—It is.

"Is there any room for the attornies in the neighbourhood of any of the courts?—None whatever at Westminster; it is even difficult to get a consultation; there is only the room adjoining the robing-room in the Queen's Bench Court.

"Have you had an opportunity of observing whether the access for witnesses, to the courts, or passing from the courts, is convenient at Westminster?—Extremely inconvenient; so much so, that

if we have a cause in which there are many witnesses, we are obliged to have one or two clerks to keep them together.

"*Do you find great inconvenience in getting the witnesses into court?—Yes; they are put to great inconvenience, and frequently into a state of excitement by being pushed about, which has an effect upon them as witnesses. I have observed it frequently; a man is at a distance from the hall; he is called up; persons are running for him, and then he has to push his way into the witness-box, out of breath, and looks sometimes much more like a culprit than a witness.*

"Would it be attended with any considerable saving of time if there were a room in which the solicitors could attend to some of their business while waiting for their case coming on?—I think that would be very material; it would very materially assist them in the discharge of their duties in court.

"Have the attornies at present any convenience if they have to prepare an affidavit for counsel at the moment, or other matters, except by adjourning to a coffee-house?—None whatever, except by writing on their hats, and pushed about and overlooked by other persons.

"Are the passages to the courts dark or light?—Very dark.

"Would there be any facility to the attornies, from all the courts of law and equity being under the same roof?—I think very considerable facility.

"From your experience, do the suitors sustain any loss or damage from delay, as well as expense, from the causes to which you have adverted?—*I think they sustain very considerable disadvantage and expense from those causes,* and very frequently from not having their business so well done as it would be if there were accommodation; it is prepared hastily, not on that consideration it would be if the party had more accommodation; points are frequently suggested by counsel during the proceeding of a cause which call for the attention of the solicitor, and occasion his sending a clerk to hunt up some evidence, or make some inquiry, all of which is done hastily and badly from the want of accommodation; and all that evil ultimately falls on the client, or a great portion of it.

"Does the inconvenience principally fall upon your branch of the profession?—It principally falls upon our branch of the profession. There was a meeting of the profession, a very extensive meeting, some time ago on the subject, and a petition very numerously signed.

"Had you many dissentients at that meeting?—I was present at the meeting, and did not hear one."

Every part of this statement deserves attention, but more particularly that regarding witnesses. On this subject we

are induced to quote another passage from Mr. Hill's evidence:—

"Is there any waiting-room or convenience for witnesses in attendance, except the great hall?—I believe there is not.

"Are witnesses obliged, winter and summer, to attend in that great hall without a seat, or any means of resting themselves, or obtaining any refreshment in the hall?—They are; and if it is not considered impertinent, I would say, it has often struck me, that in the administration of our law we show very little regard to the convenience, or comfort, or feelings of witnesses; we compel their attendance, and compel them to speak, *and they are too often treated as if they had done something wrong in being connected with the cause in which they had come to give evidence.*"

Justice will never be efficiently administered until both bench and bar habituate themselves to regard witnesses as what they truly are in nineteen cases out of twenty,—persons placed in a very disagreeable position from which they would be exceedingly happy to withdraw. At the same time, nothing is more silly than for people to enter the box with a firm conviction that they are to be bullied or confused; and what many of them mistake for cavilling or captiousness in the examining counsel, is nothing more than a fair and logical attempt to make them analyse their impressions, and distinguish between fact, hearsay, belief, and inference.

The inconvenience occasioned by the distance of the courts from one another, from the judge's chambers, and from the offices, is an independent evil, distinct from the simple question of situation. It is most felt by the equity men, but the common law practitioners also suffer considerably.

The true character, and the mischievous though often imperceptible effects, of this separation, are well stated by Mr. Field:

"My idea is, that no thoroughly effectual reform in the practice of the law, can possibly take place without concentrating the courts and offices, and having the offices under the same roof as the courts; and that to carry on the law business of the country properly, if you do not bring the Westminster Hall courts to Lincoln's Inn, you must take all Lincoln's Inn and its appurtenances to Westminster. I have looked at the matter more with reference to its bearing on the science of procedure (which has been a subject of interest to me for a few years past) than in any other point of view, and it has struck

me that, with reference to the monstrous mass of evil to be removed by improvements in procedure, a great deal more is to be done by arrangements, almost mechanical in their nature, and comparatively less by arrangements as to forms, pleadings, &c. than would at first be imagined; and that the mechanical arrangement which is most important is, the concentration of the courts and the offices. . . . The effect of the offices being scattered about and at a remove from the courts, in delaying proceedings in the offices, and in-causing the suitors to lose days after days, (perhaps only by a day at a time, but in constantly-repeated losses), I think is far beyond present estimate. Throughout the whole of an equity suit, the offices are producing food for the courts; the court does nothing except in operating upon that which has first been prepared in the offices; and it is quite clear that if the offices are so arranged that there are great mechanical inconveniences about them, you delay greatly that approach to the judge, which the suitor alone goes into court to obtain."

"For the country to do its official work well, it appears to me it must proceed on the same principle it proceeds on in the Stamp, Customs, Excise, or any other department of the public service; the same principle that I, in my own business, must proceed on, to have my work done well. If I were to have one room in one house, and another room in the next street, and another room in the next, and so on, and put one of my clerks in each, I could not get on at all; or if I did get on, it would be in a very inefficient and bungling manner, and my work when done would be worth but little, and cost a great deal. It appears to me that, with respect to work done by the judicial establishment, the same observation applies as would to a solicitor's office; and therefore, if I wished to have the clerks of the judges, as I may call the officers of the court, perform their duties efficiently, I would subject them to the same influences I would my own clerks. If I were never near my clerks, I could not expect them to do their work well; nor will the clerk of the court, or of the judge, in my opinion, do his work so well if he is placed at a distance from the court, and in a spot where he is neither seen by the judges, by the bar, or the solicitors, or by the body of his fellow officers, but only by the clerk of the solicitor who is sent to him.

"How would the officers be more under the eye of the court from that circumstance?—I do not mean to say that if the chancellor wanted to ask the master why he prepared his report in a particular way, or why he had not prepared it at all, he should ring a bell for him; but that state of things would be more nearly approached; and my idea is, that until we do in some degree approach that state

of things, there will not be that close connexion between the heads of the court and its subordinates which is quite necessary to supply sufficient motives to energy to the subordinates, and also to enable the heads of the court to see that the duty is performed satisfactorily."

Mr. Dowdeswell, the senior master, states that the common excuse is, "We must have counsel to attend on a particular business, and we shall not be able to procure their attendance till after the Term." The excuse may be true or false; the business is postponed in consequence, though were the courts under the same roof, the chances are that the counsel would attend, and at all events it would be known whether he could or not. This gentleman also states that the existing accommodation for the masters is insufficient:

"If, in consequence of the proposed arrangements, it should be necessary to increase the number of masters, additional buildings will be required, and our offices are not sufficiently capacious for that purpose; there are no means of furnishing chambers to any additional masters, and besides that, our present chambers are extremely inconvenient. Our own rooms are tolerably convenient, but the business of the head clerk, which is very laborious, and requires that there should be some degree of quietness, is a passage room, and he is subject to eternal noise and inconvenience, arising from the flux and reflux of persons attending the master. It will be necessary, that if he has to attend to the dispatch of business, he should have additional accommodation; and if additional clerks are appointed, there must be of course different apartments for them."

The places of deposit for deeds, papers, &c. appear to be unfit for the purpose, and considerable injury is sustained:

"Do those documents sometimes remain for a very considerable period in the master's office?—I believe for years and years.

"Do they sustain any injury from the present place of deposit?—I should think considerable injury, from the inspection I have occasionally made of our receptacles below stairs; they appear to me very damp; some of the boxes are mouldering to pieces; the consequence of that is, that the contents of one box fall into another, and I think I have seen some of the papers in a great state of decay.

"You have sometimes paintings deposited in the office, have you

not?—I never have; the utmost of my riches is a few silver spoons belonging to a lunatic; we refuse to take charge of any thing of any value, from our want of adequate security."

The Lord Chancellor (Cottenham):

"In your lordship's opinion it would be desirable that all the courts should sit under one roof, and in some place near the chambers and the offices of the courts?—I have no doubt it would be a very great convenience to the profession; to all the profession, the practitioners, and to their clients.

"It would be a great advantage to their clients?—It would save expense; every thing which is for the convenience of the practitioners must ultimately be for the benefit of the clients.

"Will your lordship have the goodness to inform the committee whether to practising barristers great inconvenience does not arise from their inability to attend the masters' office during term, in consequence of the sitting of the courts at Westminster?—It certainly does; in my own practice when I was in that branch of the profession, before I had a silk gown, difficulties occurred in attendance before the masters; sometimes one barrister and sometimes the other was unable to attend by being engaged in court, and consequently the appointment before the master could not take place.

"In your opinion would it be desirable that the masters' offices should be under the same roof?—It would very much add to the convenience of practitioners."

As to the masters' rooms:

"Does your lordship consider that the present rooms of the masters are sufficient for that purpose?—I believe perfectly insufficient.

"Has your lordship sufficient recollection of the duties of the chief clerk of the master to state that his room is sufficient for the performance of those duties?—I perfectly recollect the great bustle, the hurry and confusion which always appeared to exist in the clerk's room when I have been passing through it to the master's office in former times.

"Your lordship is aware that most important duties are performed by the chief clerk?—No doubt."

Lord Langdale, M. R.:

"I have frequently considered it inconvenient to have the courts sitting sometimes in one place and sometimes in another, and I have never seen any good reason why it should be thought necessary for the courts of equity to have two places of sitting. It would, I think, afford great advantage in the transaction of business to have

all the courts sitting in the same neighbourhood. The law offices, the greater number of solicitors' offices, and nearly all the chambers of the barristers, are now in the neighbourhood of Lincoln's Inn; and besides, there is always a great deal of waiting about the courts during the transaction of business, and during the period of waiting it is material that those who have business to do which can be done in the neighbourhood should be able to do it, and that those who have no business at the moment, but are waiting for business expected to come on, should have an opportunity of exchanging sentiments and opinions, and asking mutual information on the business for which they respectively attend. My opinion is, that it would be to the advantage of the country that the courts of justice should be in one settled place, and very nearly all together.

"Has your lordship had any means of knowing whether delay occurs from the junior counsel, whose attention is principally directed to the pleadings, being attending at a distance from their chambers? —When I was a junior counsel I have frequently been under the necessity of delaying business of my own in consequence of being obliged to attend at Westminster; whereas, if the courts had been sitting at Lincoln's Inn, I could have been sometimes in chambers and sometimes in court, having, during my own absence from court, a clerk watching the progress of business there. When the chambers of counsel are near the courts, various intervals of time may be very usefully employed for purposes of business, which cannot be accomplished when the chambers are remote from the courts, or as far from one another as Lincoln's Inn and Westminster Hall are.

"If the courts of equity sat very near to the masters' office, would that be attended with any convenience in term?—I think it is very material that the masters' offices should be near the courts; it is obvious that it is necessary for the counsel and solicitors to be attending at the masters' office, and if the masters' offices are at Southampton Buildings and the courts at Westminster, they cannot be certain of their attendance; whereas, if the courts were near the masters' offices, the counsel might very usefully devote a part of their time to attendance at the masters' office."

The Vice-Chancellor Shadwell:

"Does your Honour happen to know whether any delay is experienced in the prosecution of business in the masters' office during the period when the courts of equity are sitting at Westminster, any difficulty of counsel attending the masters' office?—I remember when I was at the bar, and used to attend the masters' office, it was extremely difficult for us to attend, and things were put off from day to day repeatedly, because we were at Westminster when we ought to be in a distant place,

"Does your Honour happen to know whether the preparation of pleadings is necessarily delayed by the attendance of counsel during the period the courts of equity are sitting at Westminster?—Yes, certainly; I have had a great deal of experience of that, and I believe every one has felt it so who has had to do with the preparation of pleadings."

The Vice-Chancellor Wigram:

"Can you state, with a view to the convenience of the judges, the bar, and the solicitors, that it is desirable that the courts should be concentrated?—As far as the day's work of an individual judge is concerned, it appears to me to make little difference to him where his court may be; but, judging from my own case, it would be of the greatest possible advantage if an equity judge could hold convenient communication with the judges of the common law courts; so as to the masters also: I frequently feel the want of such power of communication; I cannot now have it without adjourning a cause, or at least suspending my judgment upon the case; and even then I have no means of getting at many of those I should wish to consult, except by seeking them out in private. To all counsel a similar advantage would be gained, if they could conveniently communicate with the counsel of other bars than their own; but to the junior counsel, who have to attend the masters, and draw pleadings, it is of the greatest importance that they should be able to transact such business in places as near as possible to the courts and to the masters' offices.

"The occasions for intercommunication with judicial functionaries or gentlemen connected with the profession are not of rare occurrence?—They are of very frequent occurrence, and if the means existed, I should avail myself of them much oftener than I am now able to do, and that I am persuaded with advantage to the public as well as myself.

"What is your opinion of having all the courts and offices under one roof?—That it is most desirable.

"If the courts should sit one part of the year in one place, and another part of the year in another place, would there not be an inconvenience from not having a library in both places?—Assuming that a library is desirable, there would be an inconvenience in sitting where there was no library. I could never understand how the convenience of the public was consulted by the present system of changing the place of the sittings of courts of equity. If the courts always sat at Westminster while parliament was sitting, there might be a reason for the change, but that is not the case. The terms regulate the place of the sittings of courts of equity, without reference to the sitting of parliament."

Mr. Sutton Sharpe, Q. C.:

"Do you consider it desirable that the courts of law and equity should be under the same roof, so that there should be a communication between the barristers practising in those courts?—I do, indeed; that is the consideration which most presses on my mind, with respect to changing the position of the courts, namely, bringing them from Westminster to some central spot where they can all stand together, for I think that it would tend greatly to the proper administration of justice, that all the courts, both of law and equity, should be together in one place; I think the separation that has taken place, particularly of late years, between the courts of law and equity, has been very injurious to the administration of justice. In the first place, the only real public which the courts of law or equity have, is the profession, and the attendance of that public is best insured by all the courts sitting together in one place. And again, the separation of the courts of law and equity, that is, their sitting in different places, has led to the separation of the bar, which has been very injurious to the general administration of justice, making the members of the bar who practise in courts of equity almost members of a distinct profession from those who practise in the courts of law, very little communication now taking place between the members of the two courts."

Mr. Bryan Holme (Holme, Frampton and Loftus):

"In your experience, has the sitting of the courts at Westminster been attended with inconvenience to your business?—Certainly, with very great inconvenience.

"Both as respects your practice in the courts of law and equity?—Yes; the whole of the day may be lost in attending upon one business; a motion, for instance, or any other small business, which requires perhaps the attendance of the principal, otherwise it may not go right; things often turn up in the course of a motion which the attorney does not anticipate, and which counsel cannot be apprised of beforehand, and it may be necessary to instruct him on the spot.

"What becomes of your business in the offices during the day, while you are at Westminster?—The clerks attend to it, but it is frequently necessary they should receive the instructions of the master, more particularly now, as there are two deliveries of letters, and parcels are constantly coming in, as to which the clerks want instructions, and money is often wanted for heavy payments which cannot be foreseen and provided for, such as legacy duties, and various other matters which do not occur to me at present.

"Will you have the goodness to state to the committee the prac-

tical inconvenience you have experienced in consequence of the sittings at Westminster?—One is often obliged to come down at the sitting of the court, and to stay during the whole day, waiting for a cause or a motion coming one; one cannot calculate, with any degree of certainty, when it will come on, as it often happens that many causes are struck out of the paper, and that which we supposed would not come on on that day, or late in the day, comes on the very first; and therefore one is obliged to go down early in the morning and remain the whole day."

Mr. Loftus, a member of the same firm, states that the same sort of inconvenience is experienced in the common law department, in consequence of the judges' chambers being so distant from the courts whilst sitting at Westminster:

"It has never occurred to you as advisable to remove your office to Westminster?—That would be impossible, except at very considerable inconvenience. All the public offices in the common law courts are situated in and about the Temple and Chancery Lane, near to which our own offices are.

"Is your attendance upon those offices during term interrupted by the sittings at Westminster?—Frequently; for it often happens that one judge will be sitting in chambers, where, according to the present practice, very important points are decided, and another judge sitting at Nisi Prius at Westminster; it is necessary for the interest of the client that I should be attending as well the case before the judge at Nisi Prius as that before the judge at chambers.

"Do you consider it necessary that the principal should attend at chambers?—Yes, in many cases I consider that important; there are a great many important points decided at chambers."

Mr. S. Martin:

"There is one great inconvenience from the present system, which I ought to mention; it is this; an immense quantity of business is done at the judges' chambers at Serjeants' Inn, and a judge always goes to chambers at three o'clock, and sometimes out of term at ten o'clock in the morning; and it has occasionally occurred several times a week with me and with many others, to be obliged to go from Westminster to chambers to attend a judge. During the last few terms, the judges, I believe, have come to the determination not to hear counsel at chambers during term; but previous to that, the inconvenience arising from being occasionally obliged to go to chambers from three till four, or half-past four, was very great.

"Do you know whether that resolution of the judges arose from

the inconvenience of bringing gentlemen from Westminster for a short time?—I rather think not; I believe it arose from a different consideration.

"Are matters of considerable importance, materially affecting the ultimate decision of the case, heard at chambers?—Oftentimes; that is one of the greatest grievances I consider the law labours under at present.

"Do you conceive that the public would sustain great inconvenience from counsel being excluded from being heard on such matters? I do, decidedly.

"Are you at all aware of the reason which has led to the resolution not to hear counsel at chambers during term?—I believe it was in consequence of the judges having thought that business of too important a nature had been in the habit of being transacted at chambers, and a desire on their part that that species of business should rather be brought before the courts: at least, that I have heard stated as the reason.

"Has that been accompanied by any resolution on the part of the judges prescribing what particular description of business shall be heard at chambers?—No, not that I am aware of; I have gone to chambers myself, and been told that I could not be heard; that the judges had come to a determination that counsel could not be heard in term, in any case."

It may be worthy of consideration whether the judges should not be relieved of a great deal of the minor business which comes before them at chambers, so as to be left at leisure to give their full attention to matters of importance. Perhaps the services of the masters might be rendered available in this respect. Practically, they already decide many points which are nominally decided by the judge.

We regret to find that solicitors are getting more and more in the habit of leaving the ordinary business transacted at judges' chambers to clerks.

Mr. Harvey Gem:

"It has been stated that solicitors are not in the habit of attending at the judges' chambers. Can you account for that non-attendance?—My belief is, that they ceased to attend through the extremely bad accommodation afforded by the old judges' chambers, and I consider the same thing is happening now through the inconvenience and wretched accommodation of the Nisi Prius Courts to which I was referring, the Bail Court and the Exchequer Chamber;

attornies will not attend personally the trials of causes in such courts."

A single extract from Mr. Barry's evidence will be sufficient to show that the additional accommodation required cannot be had at Westminster:

"In your plan for the houses of parliament you had reference to the construction of courts, had you not?—No, the only alteration which it contemplates in the law courts is a change of the elevation towards Old Palace Yard and St. Margaret Street, to harmonize those fronts with the rest of the building.

"How would the courts be connected with the houses of parliament?—No otherwise than they are at present.

"You have said, that your attention had been addressed to the present state of the courts; does it appear to you that any material increase of accommodation could be given in those courts?—On the side of the Hall where the courts are placed, unquestionably there could be but little increase of accommodation given; and to provide additional accommodation on the opposite side of the Hall would be attended with disadvantage, I think, to the convenience of the houses of parliament, besides not being contiguous to the courts themselves.

"Do you know whether any purpose has been designed for the application of the site of the present houses of parliament when the new houses shall be occupied?—The site of the present houses forms part of the general plan of the new houses.

"Would not there be, on the present area, a sufficient room to build any additional courts which may be required?—Not without inconvenience to the houses of parliament.

"Do you mean without interfering with the arrangements of your plan?—Yes.

"Would your present plan, suppose it carried into effect, leave any spare space or area for application to any public purpose?—None whatever.

"To what purposes are to be applied the present house of lords, and the present house of commons, and the committee rooms, in one of which we now are?—The purpose to which the site of the present houses is to be appropriated will be for the state officers' rooms of the house of lords as well as the parliament-office, which is part of the general plan of the new houses of parliament.

"There would be sufficient room, would there not, for those purposes, in addition to room enough for two or three new courts?—No; for the whole area is appropriated for the rooms required.

"Do you mean that the plan you are now engaged in carrying into effect will absorb the whole space of the present houses of parliament and the apartments connected with them?—I do, with the exception of what will be given up for the enlargement of Old Palace-yard.

Where, then, ought the new building to be erected? Undoubtedly in a central situation, and three are named by Mr. Barry: 1, Lincoln's Inn Fields; 2, the area bounded by Bell Yard on the east, by the Strand on the south, by Newcastle Street and New Street on the west, and by Carey Street on the north: 3, between Chancery Lane and Fetter Lane, to the north of the Rolls' Gardens. He gives the preference to the first:

"What has been the result of your consideration of that subject?—The result of my consideration on that subject is, that the site of Lincoln's Inn Fields is by far the best of those which have been brought under my notice.

"What is the amount of the open space in Lincoln's Inn Fields and its immediate neighbourhood?—The amount of the open space in Lincoln's Inn Fields, the gardens, and the new square, is about eighteen acres and one-third.

"What is the space proposed to be covered by the projected building for the law courts?—About two acres and one-third, or between one-eighth and one-ninth of the entire area.

"What is the height of the proposed building?—The height of the proposed building would be about fifty feet.

"What is the accommodation proposed to be afforded by your design?—Supposing the building to be placed in Lincoln's Inn Fields, the accommodation, according to my design, would be for twelve courts of law and equity, with their several appendages, and a common hall for the public, nearly equal to the area of Westminster Hall, on the principal floor. Each of the proposed courts is intended to have an attached room for the judges, a room for the judges' clerks, a room for barristers, a room for solicitors, a room for witnesses, and in the law courts the means of access to the witness box, without interruption from the public; on the same floor would also be obtained retiring-rooms for juries, rooms for grand juries, for the grand inquest, for libraries, for refreshments, &c.; it is also proposed, according to my design, that the whole of the records of the country should be arranged on the ground floor, where sufficient space would be afforded for an increase of about

one-third of their present number, and accommodation provided for record offices, examining rooms, &c.; it is also proposed that the masters in chancery should be accommodated in the upper floor of the proposed building; and that rooms should be provided for resident court-keepers, porters, &c.

"Have you provided any rooms for the purposes of consultations for the counsel and attornies?—Yes.

"How many?—One to each court.

"You have mentioned a library; is that proposed to be a common library for the whole establishment, or one to each court?—It might be arranged as one common library, or a separate library might be attached to each court, as may be thought most desirable.

"You have mentioned a place of deposit for the records; have you maturely considered what would be necessary for the purpose of convenient access to the records of the country if they were deposited in one place?—Yes, I have.

"Is it your opinion that a place could be provided for the safe deposit of the records, and with convenient access?—Yes."

He thinks that the enlargement of the various openings would more than compensate for any check to the circulation of fresh air occasioned by occupying the centre of the Fields.

Attempts have been made to show that the removal, instead of being for the benefit of the profession at large and the public, would only benefit a particular class of practitioners, with whom the proposition originated. In answer to this objection, we have only to call attention to a statement made by Mr. Wright of the Chancery bar:

"With regard to the site of the courts, I have not much considered that subject; but to inform my mind upon it before I came here, I took this course. I had heard that Lincoln's Inn Fields was supposed to be a convenient place, and I think somewhere in that neighbourhood is the most convenient place, and for this reason: there are in England above 9,000 attornies, who practise in the superior courts of law and equity at Westminster; of these there are, according to the present year's Law List, 2751 who practise in London; and there are above 6700 attornies who practise in the country, and by their agents in London; but the precise number of country practitioners I have not been able to ascertain, from some of them having offices in different towns. Of the London practitioners, above 1300 practise within half a mile of Lincoln's Inn; and of these practitioners there are 803 firms who are agents for country attornies; and of these agents, 479 firms live within half

a mile of Lincoln's Inn, and these 479 agents alone transact the court business of as many as 5455 country attornies; and two-thirds at least of these 479 agents live within a quarter of a mile of Lincoln's Inn. The greater part of the agency business of the kingdom is transacted by comparatively few firms; and though there are 803 firms who transact the country attornies' agency business in London, 51 of these firms alone, who live within a quarter of a mile of Lincoln's Inn, transact the business of 3007 country clients, which approaches towards one half of the whole business of the country attornies in the kingdom. There are 196 of the London attornies whose chambers are situated eastward of St. Paul's, and they transact collectively the business of 908 country attornies; and to all these parties courts near Lincoln's Inn would be more convenient than at Westminster, because such courts would be nearer their chambers by one mile and a half than the present courts at Westminster. The agents in London necessarily conduct all the law and chancery business for all the attornies in England, so far as it relates to the practice and pleadings in the courts at Westminster. These facts make it clear that by far the greater part of the business of England is transacted, as to matters of procedure, applications to the courts, drafts, all attendances on the public offices, and attendances of attornies one upon another, within half a mile of Lincoln's Inn."

Mr. Maugham, the Secretary to the Incorporated Law Society, is called to speak to the character of the petition:

"How many signatures are there to the petition?—There are 1370 signatures, as stated in the Report of the Committee on Public Petitions, but that includes firms only; there are 1500 individuals.

"Is it signed by any country solicitors?—I think not; that was not intended.

"You know the names of the individuals who have signed that petition, and their standing in the profession?—I do.

"Do the solicitors, whose names are attached to that petition, transact the chief business in London?—I believe they do; it is signed by solicitors having, I think, the largest quantity of all the various kinds of professional business in London."

The principal objections, both those that rest on reasoning and those that consist of prejudice, are concisely stated by Lord Abinger:

"Has your lordship's attention been at all directed to the present site of the courts at Westminster Hall?—Yes, it was very much, when they were built by the late Sir John Soane.

"Does your lordship consider the site as convenient generally to the profession and to the public?—It has been the same for the best part of a thousand years, and no fault has been found with it until very lately."

This argument occupies a prominent place in the Book of Fallacies and the Noodle's Oration, nor was it ever worse applied. His lordship might as well say that a house which had done well enough for a small and poor family, would do equally well for a rich and large one:

"Will your lordship have the goodness to favour the Committee with any observations which occur to you against a removal?—I would refer first of all to the very great expense of it: the removal to that particular situation in Lincoln's Inn Fields, would no doubt be a great advantage to a number of persons living in that part of the town, but not a general advantage. Then I think the annexation of the courts of justice to the houses of parliament, the contiguous position of them, is an advantage; *perhaps there is some* prestige *or some association which may operate on my mind more than it does on the minds of others who are more enlightened,* but I do not like myself to witness the separation of the administration of justice from the immediate vicinity of that which was anciently the king's palace; it may be a foolish prejudice I have against change with all its accompaniments, and no doubt that would be a very trifling circumstance in comparison, if the advantage of the removal were very great; but if I am asked my opinion, I do not think that a young barrister or a young attorney is at all prejudiced by having to walk from Lincoln's Inn or the Temple down to Westminster; the inconvenience I think is but imaginary, generally speaking; it is of course convenient for persons who wish to move but a short distance to have the courts near to their residence."

The association with the king's palace is a curious association to pick out and dwell upon amongst the many higher and nobler ones connected with the Hall; and the sneer might have been spared. Assuredly a young barrister or a young attorney is not prejudiced by a walk, but the client is prejudiced if the attorney or barrister, whether young or old, is prevented by any cause whatever from paying the required attention to his business.

His lordship, on being asked whether the courts are convenient, replies that his court, the Court of Exchequer, is

convenient enough, though the small court attached to it is not quite large enough :

"Will your lordship carry your recollection back to the Court of Queen's Bench and state whether that is convenient?—I think it is not quite large enough; at the time when those courts were made I rather thought that court should have been the Court of Exchequer and that the Court of Queen's Bench should have had the larger court; the Court of Queen's Bench at that time had a great deal more to do than the Court of Exchequer, *but the business is now equal in both.* But I understand there are courts to be built with the new houses of parliament. The present courts were intended by Sir John Soane to be extremely convenient, and he formed a great many passages which he thought would afford public facilities. I ventured to tell him at the time that they would afford no facilities at all, and I have turned out to be a true prophet, they have been of no use.

"Might not those spaces now be used with great advantage to enlarge the courts?—Some of those spaces I imagine might be thrown in, but in the Court of Exchequer the accommodation is extremely good; that court is large enough."

The business is very far from equal in both, and never can be so whilst the jurisdiction of the Queen's Bench continues so much more comprehensive than that of the Exchequer. According to Mr. Barry, his lordship is also mistaken in supposing that there are courts to be built with the new houses of parliament. On the whole, the only statement not open to discussion in Lord Abinger's evidence is that relating to the convenience of his own court, in which alone comfort and convenience have been attended to, or apparently even thought of, by the architect.

With regard to the supposed expense of the new building, we would simply request any thinking man to compute the amount of pecuniary loss and mental vexation annually endured by entire classes of the community in consequence of any material checks or hindrances in the administration of justice, and we are quite sure he will instantly agree with us, that the public money can never be better employed than in removing them.

H.

DIGEST OF CASES.

COMMON LAW.

[Comprising 1 Adolphus & Ellis (New Series), Part 3; 2 Gale & Davison, Part 3; 2 Manning & Granger, Parts 3 and 4; 3 Manning & Granger, Part 1; 3 Scott's New Reports, Part 4; 4 Scott's New Reports, Parts 1, 2 and 3; 9 Meeson & Welsby, Part 5; 10 Meeson & Welsby, Part 1; and 1 Dowling's Practice Cases (New Series), Part 5.]

ACCORD AND SATISFACTION.

The plaintiff, the acceptor of a bill of exchange, on the day it fell due, sent a person to the defendant, who held it, to pay the amount of the bill and bring it back. The defendant received the money and gave a receipt for it, but said he could not give up the bill. The plaintiff being informed of this, sent again to the defendant to demand the bill or the money, but he did not give up either. Afterwards, on the same day, the defendant sent to the plaintiff a paper signed by one G., acknowledging the receipt from the defendant of the amount of the bill, and undertaking to bear the plaintiff harmless for the amount, if the bill, which he stated to have been lost, should be presented. The plaintiff kept this guarantee, but nevertheless sued the defendant for money had and received: Held, that his right of action vested on the defendant's refusal to repay the money or give up the bill; and therefore that the receipt by the plaintiff of G.'s guarantee was in the nature of accord and satisfaction, and was no defence to the action, unless specially pleaded.—*Alexander* v. *Strong*, 9 M. & W. 733.

ACCOUNT STATED.

(*Evidence of.*) A company having contracted a debt with the plaintiff, and the debt not being paid, he laid an attachment on money of theirs in the hands of bankers. While the attachment was in force, the defendant, representing himself to be a director of the company, called on the plaintiff's attorney for the purpose of making an arrangement about the debt, when it was agreed that the following letter should be written by the defendant to the plaintiff, which was accordingly done: "As director of the B. W. Company, I have to request you will accept the sum of 50*l.* on account of your claim of 116*l.* 19*s.* 7*d.* against the company; and in consideration of your withdrawing the attachment against the funds of the company, I agree on the part of myself and on behalf of the other directors, to pay you the balance of 66*l.* 19*s.* 7*d.* &c. on the 27th August next:"

Held, that this letter, coupled with the above facts, was evidence of an account stated; and that it was no answer to show that the defendant was not a member of the company when the original debt was contracted.—*Barker* v. *Birt*, 10 M. & W. 61.

ACTION ON THE CASE.

1. (*When maintainable against A. for negligence of B.*) The defendant, a builder, was employed by the committee of a club to execute certain alterations at the club-house, including the preparation and fixing of gas-fittings. He made a sub-contract with B., a gas-fitter, to execute this part of the work. In the course of doing it, through B.'s negligence, the gas exploded, and injured the plaintiff: Held, that the defendant was not liable in case for this injury. (6 M. & W. 499; 12 Ad. & E. 737.)—*Rapson* v. *Cubitt*, 9 M. & W. 710.

2. (*When maintainable on duty arising out of contract.*) A. contracted with the postmaster-general to provide a mail-coach to convey the mail bags along a certain line of road; and B. and others also contracted to horse the coach along the same line. B. and his co-contractors hired C. to drive the coach: Held, that C. could not maintain an action against A. for an injury sustained by him while driving the coach, by its breaking down from latent defects in its construction. (4 M. & W. 337.)—*Winterbottom* v. *Wright*, 10 M. & W. 109.

AFFIDAVIT.

1. (*Rule as to filing affidavits on enlarged rule.*) A rule for judgment as in case of a nonsuit, obtained in Michaelmas Term, was enlarged until the fifth day of Hilary Term, all affidavits intended to be used in showing cause to be filed a week before the first day of term. The Court refused to dispense with this condition (the defendant not consenting) upon a suggestion that the omission arose from a mistake of the attorney's clerk.—*Crosby* v. *Betts*, 4 Scott, N. R. 373.

2. (*Entitling.*) If no addition be given to the surname of the party in the title of an affidavit, it will be assumed to be the name of the elder; such an affidavit, therefore, may be used in a cause where one of the parties is described as "the elder," the names agreeing in other respects.—*Young* v. *Young*, 1 D. P. C. (N. S.), 865.

3. (*Sworn before attorney—Using affidavit sworn on former rule.*) The rule of H. T. 2 Will. 4, s 6, against swearing affidavits before the attorney in the cause, does not apply to proceedings on the crown side of the Court of Queen's Bench.

Where an affidavit has been used on one rule, it cannot be used on another to prove facts stated in it, which, though material on the latter rule, were immaterial on the former.—*Reg.* v. *Mizen*, 1 D. P. C. (N. S.), 865.

AGREEMENT.

(*Construction of—How declared on.*) The declaration (in assumpsit) stated several documents—first, certain articles of agreement of the 27th July, 1835, between the plaintiff of the first part, the defendant Gumble of the second part, and the defendant Booth of the third part, by which the defendants (amongst other things) covenanted that Gumble should pay to the plaintiff annually for twenty-one years, determinable as thereinafter mentioned, 150*l.*, and certain further payments on allowances per gallon on the sales of spirits therein mentioned, it being agreed that when the amount of allowances to the plaintiff should exceed 400*l.* annually, the annuity of 150*l.* should not be payable to or be demanded by the plaintiff so long as such allowances should amount to 400*l.* per annum; secondly, an agreement in writing, dated the 23d August, 1836, between one S.

the defendants and the plaintiff, by which S. was constituted an agent to carry on the business at a certain distillery of the defendants, on certain stipulations therein, for the term of seven years certain, and in which agreement was contained a clause, that, in consideration of the plaintiff relinquishing the annuity of 150*l.* granted to him by the former agreement, the plaintiffs should pay him 300*l.* per year from the 19th July then last, payable quarterly "during this contract, in lieu thereof; and that no rights, or benefits, or privileges belonging to the plaintiff, not here set forth and given up, are relinquished by this agreement;" thirdly, a document called an agreement in writing between the defendants and the plaintiff, being in fact in form of a letter written by the defendants to the plaintiff, dated 25th January, 1838, in which the defendants stated, that, to avoid any misunderstanding as to the meaning and interpretation to be put upon the deed of agreement of the 27th July, 1835, and the agreement of the 23d August, 1836, then existing between them, in regard to certain allowances to be made by the defendants to the plaintiff, the defendants thereby declared that the plaintiff was entitled, under the deed of 1835, to 4*d.* a gallon on all spirits sold, and 6*d.* a gallon on all brandies sold, not to yield to the plaintiff less than 400*l.* for every year, or to be made up to that amount, as well as any saving that might be effected as set forth in that deed, and that the plaintiff was to be paid 300*l.* a year over and above all other allowances under the agreement of 1836, to yield him together not less than 700*l.* annually, and such further sums as the sales at 4*d.* and 6*d.* a gallon as above named might amount to. The declaration then alleged mutual promises, averred performance on the part of the plaintiff, and assigned as a breach the non-payment of the annuity of 300*l.* for two years and a half, commencing in July, 1839.

Held, that upon the proper construction of the agreement of the 23d August, 1836, taken by itself, the plaintiff was entitled to receive the annuity of 300*l.* irrespective of the amount of allowances.

Held, also, that the contract between the parties was to be inferred from the agreement of the 23d August, 1836, and the letter of the 25th January, 1838, taken together; and that a plea that there was no consideration for the making the last-mentioned agreement (the letter) was untenable.

Held, also, that it was not necessary that the relinquishment of the annuity of 150*l.* under the agreement of the 27th July, 1835, should be by deed, it being enough that the plaintiff abstained from demanding it.—*Home* v. *Booth*, 4 Scott, N. R. 526.

AMENDMENT.

1. (*Of entry of verdict on postea.*) Debt on simple contract for 10*l.*; the plaintiff's particulars claiming 5*l.* 15*s.* The defendant pleaded nunquam indebitatus as to all but 3*l.* 10*s.*, and as to that a tender. The verdict was given (as appeared on the under-sheriff's notes) thus:—"We find for the plaintiff for the full amount." The postea was indorsed with a verdict for 5*l.* 15*s.* debt, without noticing the issue on the tender, and without deducting the 3*l.* 10*s.* paid into Court with the plea. The plaintiff, who had proceeded to sign judgment and tax the costs, with notice of the irregularity, was allowed to amend the postea on payment of the costs of a writ of error sued out by the defendant, and of the application.—*Wallis* v. *Goddard*, 2 Man. & G. 912.

2. (*Under* 3 & 4 *Will.* 4, *c.* 42, *s.* 23.) In an action of covenant for not repairing premises pursuant to the covenants in an indenture of lease, the declaration, in deducing the plaintiff's title, stated that one J. P. (who had an interest and

also a power to appoint, "by any deed or writing to be by him sealed and delivered in the presence of and to be attested by two or more credible witnesses,") by a deed, professing to be attested by two credible witnesses, and to be made by virtue and in exercise and execution of the power, did "direct, limit, and appoint" the premises, and the reversion thereof, to the use of the plaintiff. It appearing that one of the attesting witnesses was the wife of the appointee, so that the deed could not operate as a valid execution of the power, the defendant had a verdict on a plea, taking issue on the appointment: the Court refused to allow the declaration to be amended by stating the deed either as a grant, or as a covenant to stand seised to uses, except on payment of all the costs of the trial.—*Perry* v. *Watts*, 4 Scott, N. R. 366.

ARBITRATION.

(*Rule under* 1 & 2 *Vict. c.* 110, *s.* 18, *to pay money pursuant to award.*) On showing cause against a rule requiring a party to pay a certain sum pursuant to an award, in order to issue execution pursuant to 1 & 2 Vict. c. 110, s. 118, it is competent to take any objection which would be available on showing cause against a rule for an attachment for non-performance of the award; and therefore, if it be doubtful whether the award is good, the Court will not make the rule absolute.—*Spence* v. *Clarkson*, 1 D. P. C. (N. S.), 837.

ARREST.

1. (*Proof of.*) In an action on the case for maliciously and without reasonable or probable cause obtaining a judge's order to hold the plaintiff to bail, and without reasonable or probable cause for believing, and not believing, that the plaintiff was about to quit England, suing out a capias, and wrongfully and maliciously causing the plaintiff to be arrested under and by virtue of such writ, and to be thereupon imprisoned, &c., the evidence was, that the defendants obtained a judge's order, and caused a capias to be issued thereupon; that the plaintiff was afterwards found in the custody of the sheriff; that one of the defendants being informed (in the presence of the other) that the plaintiff was in custody at their suit, observed that they had got him fast, and they meant to keep him; that an application by the plaintiff to a judge at chambers, for his discharge from custody, was opposed by the defendants; and that on the order for his discharge as to that writ being left with the officer in whose custody he was, he was released: Held, that this was sufficient to sustain the action, without proof of any warrant.—*Petre* v. *Lamont*, 4 Scott, N. R. 335.

2. (*Under* 1 & 2 *Vict. c.* 110, *s.* 3.) The captain of a steamer trading betweeen an English port and Hamburgh, and about to sail on one of his regular voyages, is not a person about to quit England, within the meaning of the 1 & 2 Vict. c. 110, s. 3.—*Atkinson* v. *Blake*, 1 D. P. C. (N. S.), 849.

ATTORNEY.

1. (*Right of attorney not on the roll to receive costs.*) A rule for a new trial having been made absolute *on payment of costs* by the defendants, the Court refused to expunge the conditional words, upon a suggestion that the plaintiff's attorney was not on the roll.—*Punter* v. *Lord Grantley*, 3 Scott, N. R. 647.

2. (*Costs of taxation of bill.*) An action had been brought by an attorney to recover the amount of certain bills of costs, including costs incurred on an appeal to the House of Lords. The usual order having been obtained on the part of the defendant for taxation, that portion of the bills that related to business done in the House of Lords was referred to the proper taxing officer of the

House: Held, that as between the parties, the plaintiff was in the first instance bound to pay the fees necessary for obtaining the certificate of that officer.—*Becke* v. *Cattell*, 4 Scott, N. R. 246.

3. (*Communication to, when protected.*) Where, upon the sale of an estate, the same attorney was employed by the vendor and by the purchaser, a communication from the purchaser to the attorney, asking for time to pay the purchase-money, was held not to be privileged. (1 M. & Rob. 182.)—*Perry* v. *Smith*, 9 M. & W. 681.

4. (*Taxation of bill—Jurisdiction of master.*) On taxation of an attorney's bill, the master has no jurisdiction to disallow items on the ground that, in respect of the business to which they refer, the attorney was guilty of negligence. (4 Tyr. 310.)

Where A. and B. delivered a bill in their joint names for business done as attorneys, and the master, on taxation, disallowed part of the bill, on the ground that B. was not a certificated attorney during a portion of the time to which the bill referred, the Court, on affidavit that B.'s name was used at the request of friends, but that he was really not a partner with A., allowed A. to deliver a fresh bill in his own name only for the items so disallowed.—*Matchett* v. *Parkes*, 9 M. & W. 767; 1 D. P. C. (N. S.), 924.

5. (*Right of, to prevent compromise of action.*) The attorney of a defendant has no such interest in the suit as to prevent the parties from compromising it without his consent.—*Quested* v. *Callis*, 10 M. & W. 18; 1 D. P. C. (N. S.), 888.

6. (*Taxation of bill.*) The Court has no power to refer to taxation an attorney's bill containing taxable items, in an action brought upon it by his executor. (8 D. P. C. 468. Overruling *Penson* v. *Johnson*, 4 Taunt. 724.)—*Williams* v. *Griffith*, 10 M. & W. 125.

7. (*Taxation of bill—Jurisdiction of master.*) On reference of an attorney's bill to taxation after action brought, at the defendant's instance, the master has authority to determine whether certain items were necessary, and the Court will not review the taxation on the ground that the disallowance of such items was an excess of jurisdiction.—*Williams* v. *Nicholas*, 1 D. P. C. (N. S.), 840.

8. (*Costs of taxation of bill.*) Where an attorney has consented to an order to refer his bill to taxation, in a case not within the 2 Geo. 2, c. 23, s. 23, the Court, by its general jurisdiction, may order him to pay the costs of taxation if more than a sixth be taken off.—*Peters* v. *Sheehan*, 1 D. P. C. (N. S.), 943.

BANKRUPTCY.

1. (*Sale of bankrupt's property—Stamp.*) An agreement for the sale of a bankrupt's property by his assignees is exempted from stamp duty by 6 Geo. 4, c. 16, s. 98.—*Flather* v. *Stubbs*, 2 G. & D. 290.

2. (*Fraudulent certificate—Money had and received.*) Where money is given to a creditor to induce him to sign a bankrupt's certificate, the certificate so obtained is void.

To an action for money had and received, brought by a bankrupt to recover back money so paid by him, the defendant pleaded that the money had been demanded by and paid to the assignees before the commencement of the action: Held a sufficient answer.—*Sievers* v. *Boswell*, 4 Scott, N. R. 165.

3. (*Debts proveable.*) The plaintiff accepted two bills drawn on him by the defendant for value. Before they became due, the plaintiff being unable to meet

them, it was agreed that he should accept two other bills in lieu of them; in consideration of which the defendant undertook to provide for the first two, which he had negotiated. The defendant however made default, and the plaintiff was compelled to pay all the bills. The first two bills fell due *before*, but were not taken up till *after*, the issuing of a fiat in bankruptcy against the defendant: Held, in an action against the defendant for the breach of his contract of indemnity, that the bills constituted a debt of the bankrupt, for which the plaintiff was liable at the time of the issuing of the fiat, within the 6 Geo. 4, c. 16, s. 52, and therefore that the certificate was a bar. *Filbey* v. *Lawford*, 4 Scott, N. R. 208; affirmed in the Exchequer Chamber, id. 611.

4. (*Debts proveable.*) One B. being in custody on a ca. sa. at the suit of the plaintiffs, they agreed to discharge him upon his executing a warrant of attorney to secure the payment of the debt (275*l.* 12*s.*) by instalments, and upon the defendant's signing the following undertaking: "Lane and others v. Bacon. In consideration of your discharging the defendant out of custody in this action, I undertake that he shall pay the debt due to you, viz. 275*l.* 12*s.*, together with interest, by four equal half-yearly instalments, the first instalment to be made on the 17th May, 1839." The warrant of attorney was executed (to the knowledge of the defendant), the undertaking signed on the 17th November, 1838, and B. discharged from custody. A fiat issued against the defendant on the 26th April, 1839, under which he was duly declared a bankrupt, and he obtained his certificate on the 6th August following: Held, that the certificate was no bar to an action against the bankrupt for the third instalment, due on the 17th May, 1840; for that inasmuch as B. continued liable as the plaintiff's debtor by virtue of the warrant of attorney executed by him before his discharge, and the defendant's undertaking was given with reference to B.'s liability, and as a collateral guarantie for the payment of the instalment which became due before the fiat, there was no debt due from the bankrupt at the date of the fiat that could have been proved under it.—*Lane* v. *Burghart*, 4 Scott, N. R. 287.

5. (*Operation of* 2 & 3 *Vict. c.* 29, *and* 6 *Geo.* 4, *c.* 16, *s.* 108—*Notice of prior act of bankruptcy, to whom to be given.*) A creditor on a judgment founded upon a warrant of attorney, issued execution thereon, and seized and sold the goods of the debtor under a fieri facias, without notice of any act of bankruptcy committed by the debtor. On the day after the sale, a fiat in bankruptcy issued against the debtor: Held, that the assignees were not entitled to recover from the creditor the proceeds of the sale, inasmuch as, at the time of the fiat, he was not a creditor of the bankrupt, within the 6 Geo. 4, c. 16, s. 108.

Notice to a sheriff's officer in possession under a fi. fa., of an act of bankruptcy committed by the defendant, is not notice to the execution creditor, within the 2 & 3 Vict. c. 29.

Semble, a general notice to the creditor, that the defendant has committed an act of bankruptcy, is sufficient, without stating the nature of it.—*Ramsey* v. *Eaton*, 10 M. & W. 22.

6. (*Operation of* 2 & 3 *Vict. c.* 29, *and* 6 *Geo.* 4, *c.* 16, *s.* 108.) In trover by assignees of a bankrupt against the sheriff, the latter justified under a judgment recovered in the Exchequer, a fieri facias issued thereon, and a seizure before the fiat. The plea also stated a sale of the goods, but without averring that it was before the fiat, and alleged that at the time of the seizure, S., the execution creditor, had no notice of any prior act of bankruptcy. The replication stated, that, before the judgment was recovered, the bankrupt made his warrant of

attorney, authorizing certain attornies to appear for him and receive a declaration in debt at the suit of S., and thereupon to confess such action, or else to suffer judgment by nil dicit, or otherwise, to pass against him in such action, to be forthwith entered up against him of record; it then averred that the judgment in the plea mentioned was had and obtained on the said warrant of attorney, and that it was given by way of fraudulent preference. The rejoinder only denied that the warrant of attorney was given by way of fraudulent preference; and the jury found this issue for the defendants. Held, that the plaintiffs were entitled to judgment non obstante veredicto, it being admitted on the record that the judgment was obtained on the warrant of attorney, which would only authorize a judgment by confession, nil dicit, or other default, and therefore that the case was within the 6 Geo. 4, c. 16, s. 108, and the execution was not protected by the 2 & 3 Vict. c. 29. (8 M. & W. 463.)—*Rawdon* v. *Wentworth*, 10 M. & W. 36.

7. (*Commitment of bankrupt for not answering questions.*) In a commitment of a bankrupt, for not satisfactorily answering questions put to him in the course of an examination, the questions and answers in respect of which the commitment proceeds should be set forth and particularized, and a general allegation that the answers were unsatisfactory is not sufficient.—*In re Hadland*, 1 D. P. C. (N. S.), 835.

And see EVIDENCE, 1.

BASTARD.

(*Custody of.*) The mother of an illegitimate child between eleven and twelve years of age obtained a writ of habeas corpus to compel the putative father to bring the child before the Court. The child being brought up, the Court declared her entitled to exercise her own discretion as to whether she would go, and would not allow the mother to take her against her will.—*In re Lloyd*, 4 Scott, N. R. 200.

BENEFICE.

1. (*Remedy of curate appointed during sequestration, for his stipend.*) Where a curate is appointed by the special sequestrators of the bishop of the diocese, to serve the cure of a benefice during the vacation between the death of the last and the appointment of the next incumbent, he may, although not licensed by the bishop, and notwithstanding the stat. 1 & 2 Vict. c. 106, recover his reasonable stipend in an action of debt under 28 Hen. 8, c. 11, from the next incumbent; the tithes which accrued during the interval not being sufficient to pay him a reasonable stipend.—*Dakins* v. *Seaman*, 9 M. & W. 777.

2. (*Interest of sequestrator.*) The sequestrator of a benefice, appointed by the bishop under a writ of sequestrari facias, is the mere bailiff or agent of the bishop, and has no such interest in the profits as will enable him to maintain an action at law against a party who wrongfully receives them. (Bunb. 192; 2 Swanst. 174.)—*Harding* v. *Hall*, 10 M. & W. 42.

BILLS AND NOTES.

1. (*Acceptance of foreign bill.*) M., a merchant at Stockholm, on the 21st August, 1840, drew on the defendants, his correspondents in London, (amongst others,) a bill for 225*l.*, at eighteen days' date, payable to the plaintiff. The defendants, not being in funds, declined to accept this bill. On the 11th September the bill was presented for payment, and refused. On the 13th, M. died insolvent. On the 15th, the defendants, in ignorance of his death or insolvency, wrote to him

as follows:—" Respecting your drafts on us, we have to advise that we have paid *and are prepared to pay* the following" (enumerating several bills, including the bill for 225*l.*): and in a fortnight—" We have just been informed that the holders of the bill above for 225*l.* have returned it to you. This they had no right to do, as we have already explained to you they were bound to keep it till the following post-day," &c. &c.: Held, that the above letter constituted a valid acceptance of the bill.—*Billing* v. *Devaux*, 4 Scott, N. R. 175.

2. (*Estoppel on acceptor to deny drawing of bill.*) A declaration by indorsees against the acceptors of a bill of exchange, stated that certain persons using the style and firm of D. and W., on &c., at Rio de Janeiro, made their bill of exchange in writing, and directed the same to the defendants, and thereby required the defendants to pay the order of a certain person therein named and described as A. N. B. 600*l.*, sixty days after the sight thereof, and that the defendants had sight of the bill and accepted the same, and that the said person so named and described in the bill as A. N. B. then indorsed it, by and in the name of A. N. B., to the plaintiffs. The defendants pleaded, that the said D. and W. did not make the said bill of exchange in the declaration mentioned, in manner and form as therein alleged. The plaintiffs replied, that the defendants ought not to be allowed to plead or say that the said D. and W. did not make the bill, because they said that at the time when the defendants accepted the bill, it purported to be made and drawn by the said D. and W., and to have been signed by them as the drawers thereof; and that they the plaintiffs, at the time when the bill was so indorsed to them as in the count alleged, had no notice or knowledge that the bill had not been made by the said D. and W., and then, and before the bill became due, gave value for the same upon the faith and credit of the defendant's acceptance thereof, concluding by relying on the estoppel: Held, that the plea was bad, it not being competent to the defendants, after having accredited the bill by their acceptance, to deny that it was drawn by the persons who upon the face of it purported to be the drawers; that it was competent to the plaintiffs to reply to this by way of estoppel, and that the replication was sufficient in point of form. (2 B. & C. 293; 8 M. & W. 616.)—*Sanderson* v. *Collman*, 4 Scott, N. R. 638.

3. (*Title by indorsement of bill overdue.*) Indorsee against acceptor of a bill of exchange, Plea, that the defendant accepted the bill for the accommodation of the drawer, and without consideration, and that it was indorsed by him to the plaintiff two years after it became due: Held, on special demurrer, that the bill afforded no answer to the action. (1 Taunt. 224; 1 C., M. & R. 565.)—*Sturtevant* v. *Forde*, 4 Scott, N. R. 668.

And see BANKRUPTCY, 3; PARTNERSHIP, 2.

CHARTERPARTY.

(*Demurrage—Condition precedent—Pleading.*) A declaration in assumpsit on a charterparty (varied by a subsequent agreement between the plaintiffs and defendant) stated, that a charterparty was made " between certain persons trading under the firm of G. L. Jackson and Sons, on behalf of the owners of the vessel, and the defendant;" that it was agreed that the ship (then at Pembroke) should, with all convenient speed, sail to Cardiff, and there load a certain quantity of iron and coals, and should proceed therewith to Alexandria, and there deliver the same on payment of freight, &c.,—forty running days to be allowed for loading at Cardiff and unloading at Alexandria, to commence on the 16th December,

1834. The declaration then averred mutual promises; that the ship, then being at Pembroke, by and with the consent of the plaintiffs and defendant, and at the request of the defendant, remained at Pembroke for the purpose of receiving certain coals, part of her cargo, for the voyage, in lieu of loading such coals at Cardiff as in the charterparty mentioned; that the ship was, without any default or neglect of the plaintiffs, kept and detained for that purpose at Pembroke until the 17th December; that the defendant dispensed with and discharged the plaintiffs from performing that part of the charterparty which related to the sailing of the ship with all convenient speed from Pembroke to Cardiff, up to and until she had finished and completed the loading of the coals at Pembroke; that being so loaded, the ship, with all convenient speed, proceeded to Cardiff, and arrived there on the 10th January, 1835, and took in the remainder of her cargo. Four breaches were alleged: first, that the defendant detained the ship at Cardiff twenty days over and above the lay days and days of demurrage in the charterparty mentioned, whereby the plaintiffs were put to expense, &c., and whereby a large sum of money, to wit, &c., became due and payable to the plaintiffs; secondly, that the defendant further detained the ship at Alexandria, whereby the plaintiffs were put to further expense, &c.; thirdly, that although a large sum was due to the plaintiffs for freight, the defendant refused to pay them the same; fourthly, that the defendant neglected to pay a certain sum due for demurrage. The declaration also contained counts for freight, for demurrage, and for money paid. The defendant pleaded, first, non-assumpsit to the whole declaration; secondly, as to so much of the first count as claimed demurrage, that the defendant did not consent and request that the vessel should remain at Pembroke for the purpose in the first count mentioned; fourthly, that the defendant did not dispense with, or discharge the plaintiffs from performing, that part of the charterparty which related to the sailing of the ship with all convenient speed, as in the charterparty mentioned, from Pembroke to Cardiff, up to and until the time that the ship had finished the loading of the coals on board thereof at Pembroke; and several other pleas on which (or on replications thereto) issue was joined.

Two of these issues, which applied, not to the whole of the first count, but to the claim for freight only, were found for the defendant; the other issues were found for the plaintiffs; but as to the issue joined on the second plea, the jury found, "that the plaintiffs requested, and that the defendant consented, that the ship should remain at Pembroke for the purpose in the first count mentioned."

Held, that the allegation of consent was the only material allegation in the second plea, and, consequently, that being found by the jury, the verdict on that issue was for the plaintiffs. Held, also, that it was not a condition precedent to the claim for detention and demurrage, that the vessel should be at Cardiff on the 16th December, and that if it were so, the allegation that the lay days had begun at Cardiff and expired was substantially an allegation that the ship was there on the 16th, otherwise the lay days would not have commenced. But held, that the declaration was bad for not showing, by distinct averment, or by necessary implication, that the plaintiffs were owners of the ship, or parties to the charterparty, and that this defect in the declaration could not be aided by any admission in the pleas, whether found for or against the defendant; though it seems it would have been otherwise had the plea containing such admission been the only plea upon the record.—*Galloway* v. *Jackson*, 3 Scott, N. R. 754.

CHURCHWARDENS.

(*Right of, to maintain order in the church.*) A parish clerk having been dismissed

from his office by the rector, though irregularly, and another appointed, the former entered the church before divine service had commenced, and took possession of the clerk's seat: Held, that the churchwardens were justified in removing him from the clerk's desk, and also out of the church, if they had reasonable grounds for believing that he would offer interruption during the celebration of divine service.—*Burton* v. *Henson*, 10 M. & W. 105.

COIN.

(*Shipment of, abroad—Declaration of value under* 26 *Geo.* 3, *c.* 86, *s.* 3) On a shipment of a cargo from Valparaiso to England, the bill of lading described the property as "1338 hard dollars," which was a coin current at Valparaiso at the time: Held, that this was a sufficient compliance with the provisions of the stat. 26 Geo. 3, c. 86, s. 3, it being the current coin of the place where the shipment was made.

Quære, whether that statute is at all applicable to the case of shipments made in places not subject to the British laws.—*Gibbs* v. *Potter*, 10 M. & W. 70.

COMMON.

(*Approvement—Erections by lord on—Pleading.*) An owner pur autre vie of a common may approve under the statutes 20 Hen. 3, c. 4, and 13 Edw. 1, st. 1, c. 46.

The owner of a common may erect thereon a house necessary for the habitation of beast-keepers, for the care of the cattle of himself and the other persons having rights of common there. So he may erect a house necessary for the habitation of a woodward to protect the woods and underwoods on the common.

A plea justifying the erection of a house for such beast-keepers need not state the names of the other commoners, nor that they assented to the appointment of beast-keepers. (1 Lev. 52; Sid. 70.)

To an action on the case for a continuing disturbance of common, the defendant pleaded an approvement of the locus in quo, "leaving sufficient common of pasture for the said plaintiff and all other persons entitled thereto, together with sufficient ingress and egress to and from the same, according to the form of the statute, &c.:" Held, that the plea sufficiently showed that enough of common was left at the time of the approvement, and in the place where the plaintiff was entitled to enjoy it.—*Patrick* v. *Stubbs*, 9 M. & W. 830.

CONDITION. See Charterparty.

CONTRACT.

(*Evidence of.*) The plaintiff, a surgeon, for several years bestowed surgical attendance upon a lady, expecting that she would amply compensate him by a legacy, sent in no bill. She died and left him nothing, whereupon he sued her executors, claiming 500*l*. The jury awarded him 250*l*. The Court refused to disturb the verdict.

In such a case, to disentitle the party to sue, there must be something more than the mere expectation of a legacy.—*Baxter* v. *Gray*, 4 Scott, N. R. 374.

CONTRACT OF SALE.

(*Implied warranty.*) The defendant sold the plaintiff a barge which had been built by the defendant, and then lying alongside his wharf, (where the plaintiff had seen her) completely rigged: Held, that a warranty was implied that the barge was reasonably fit for use; and that, although the contract was in writing, evidence was admissible to show that in consequence of the defective

construction of the barge, certain cement which the plaintiff was conveying therein was damaged, and the plaintiff incurred expense in rendering her fit for the purpose of his trade, a purpose to which the defendant knew at the time of the contract she was intended to be applied.—*Shepherd* v. *Pybus*, 4 Scott, N. R. 434.

COPYHOLD.

(*Severance of tenement by lord—Variation of rent.*) The lord of a manor, on a grant of a copyhold tenement, can neither add to nor diminish the ancient rent.

Where the lord of a manor, having a life interest only in the manor, granted at a new rent of 2*s.* a portion of an entire tenement, the ancient rent for which entire tenement had been 10*s.*, and two hens, the grant was held invalid against his successor.

Quære, as to the right of the lord to sever the tenement, even if he had not varied the ancient rent.—*Doe* d. *Rayer* v. *Strickland*, 2 G. & D. 278.

COPYRIGHT.

(*Piracy of engraving.*) In an action on the case for pirating an engraving, brought under the stat. 17 Geo. 3, c. 57, which gives a right of action against any one who shall copy any print "in the whole or in part, by varying, adding to, or diminishing from the main design," the judge directed the jury to consider whether the defendant's engraving was substantially a copy of the plaintiff's: Held, that this direction was correct.—*Moore* v. *Clarke*, 9 M. & W. 692.

CORONER'S INQUISITION.

(*Several deodands.*) By a coroner's inquisition, it was found that the death of the individual named therein was caused by a steam-engine with a train of carriages running off the railway; that the said steam-engine was then of the value of 125*l.*, and was then the property and in the possession of the Eastern Counties Railway Company. There were three other inquisitions on three other persons, in precisely the same form, and imposing a deodand of the same amount. The deodands having been estreated into the Exchequer under 3 & 4 Will. 4, c. 99, the Court refused on motion to stay proceedings on three of the inquisitions, on payment of 125*l.* on one of the inquisitions, on the ground that the instrument moving to the death of the party could not be twice forfeited for the same accident, but left the parties to their remedy by traversing or setting aside the inquisitions.—*Reg.* v. *Eastern Counties Railway Company*, 10 M. & W. 58.

COSTS.

1. (*Security for costs.*) Where a defendant in ejectment went out of the jurisdiction of the Court in May, 1841, with the knowledge of the lessor of the plaintiff, and afterwards obtained a rule for judgment as in case of a nonsuit, which was discharged in the Michaelmas Term following, and subsequently gave notice of trial by proviso at the next Spring Assizes; the Court refused an application in the following Easter Term to compel the defendant to give security for costs, although previously to the term a similar application had been made to a judge at chambers, and a temporary order made for security for costs.—*Doe* d. *Somers* v. *Brood*, 1 D. P. C. (N. S.), 857.

2. (*Costs of the day.*) The plaintiff gave notice of trial for the first sittings in the term, but the cause did not then come on, and was made a remanet to the next sittings, and not being resealed, could not be then tried but by consent, which the defendant's attorney's clerk refused, and no trial was had: Held, that the

defendant was nevertheless entitled to costs of the day.—*Cook* v. *Smith*, 1 D. P. C. (N. S.), 861.

And see INTERPLEADER ACT, 2.

COVENANT.

(*Construction of.*) In covenant, the declaration stated, that it was covenanted and agreed between the plaintiff as lessor, and the defendants as lessees, of certain coal mines, that the plaintiff should, when he thought fit, employ a fit and proper person at each machine for weighing the coals, who should weigh the same and keep the accounts, and that his wages should be paid by the defendants; but that in case such person should not duly attend at the machine, and duly keep the necessary accounts, the defendants were authorised to discharge him. It then averred that the plaintiff appointed J. H., being a fit and proper person, and alleged as a breach, that the defendants refused to pay him his wages. The defendants pleaded, that J. H. was not a fit and proper person, that he had not duly attended to the machine, and had not duly kept the necessary accounts. At the trial, it was proved that J. H. had been appointed, and had attended for three months, after which period he was dismissed as incompetent by the defendants: Held, that the plaintiff was not entitled to judgment non obstante veredicto; the appointment of a fit and proper person being a condition precedent to the defendants' liability to pay wages.—*Lawton* v. *Sutton*, 9 M. & W. 795.

CURATE. See BENEFICE, 1.

DEMURRAGE. See CHARTERPARTY.

DEODAND. See CORONER'S INQUISITION.

DETINUE.

(*Plea of lien in.*) In an action of detinue for certain goods, to wit, 1000 yards of broad cloth and two pieces of other cloth, the defendant by his plea claimed a lien for fulling the cloths mentioned in the declaration; and it appeared at the trial that originally eight pieces of cloth had been delivered at the same time to the defendant to be fulled, and that six out of the eight pieces had afterwards been re-delivered: Held, that the plea only extended to the two pieces actually detained, and that the defendant could not under that plea set up a claim of lien for fulling more than two pieces, but should have asserted specifically his claim in respect of the eight.—*Coombs* v. *Noad*, 10 M. & W. 127.

DEVISE.

1. A testator devised as follows: "I give, devise, and bequeath unto my adopted child M. W. M., the whole of my *property* situated in P., with the furniture, &c., and all other effects in and about the said premises, &c., and also my farm called S., situated in H. I leave to my nephew W. H. W. all my other lands situate in H. and M., subject to the yearly payment of 150*l.* to my faithful servant C. W., and should M. W. M. have lawful issue, the said property to be equally divided between her lawful issue:" Held—first, "the said property" did not comprise the lands in H. and M. devised to W. H. W., the nephew—secondly, that the nephew took an estate *in fee* in the lands in H. and M.—thirdly, that M. W. M. did not, nor would her issue (if any), take an estate in the lands described by the testator as "all my other lands situated in the parishes of H. and M."—*Peppercorn* v. *Peacock*, 3 Scott, N. R. 651.

2. The testator, possessed of considerable property, real and personal, after giving certain specific legacies, gave and devised all the residue of his real and personal estate and effects to trustees, upon trust, in the first place to manage the same until his son James should attain the age of twenty-one or die under that age, and in the meantime to pay and apply so much of the rents, &c. as they should think proper in the support, maintenance, and education of his sons and daughter, William, Joseph, James, and Elizabeth (the only children then living), and of all and every other the child or children of his body lawfully begotten, who should be living at the time of his decease, or born in due time afterwards, until they should severally and respectively attain the age of twenty-one years. He then gave the annual sum of 100*l.* each to William, Joseph, and Elizabeth, to be paid to them from the time they should respectively attain twenty-one, or marry, until James should attain twenty-one, or die under that age; and proceeded as follows:—and from and immediately after my said son James shall have attained the age of twenty-one years, or die under that age, then as to and concerning all and every the said messuages, &c., and all and every the premises of the nature of freehold or leasehold, with their and every of their appurtenances, to the use and behoof of my said sons and daughters, William, Joseph, James, and Elizabeth, and of all and every other the child or children of my body lawfully begotten who shall be then living, and their several and respective heirs, executors, administrators, and assigns, for ever, or for and during all my estate, term and terms of years, and interest therein respectively, as *tenants in common*, and not as joint tenants, in the shares and proportions following, that is to say, in case there shall happen sons and daughters, or a son and daughter, or sons and a daughter, then living, then to the use and behoof of all and every such children (as the case may happen), *in proportion of two shares to each son and one share to each daughter*, and to their several and respective heirs and assigns for ever, for and during all my estate, &c. therein, as *tenants in common*, and not as joint tenants; but, in case there shall not happen to be any daughter then living, then to the use and behoof of all and every the sons in equal shares and proportions, and to their several and respective heirs, &c. for ever, or for and during all my estate, &c. therein, as *tenants in common*, and not as joint tenants; and in case there shall not happen to be any of my sons then living, to the use and behoof of all and every of my daughters who shall be then living, in equal shares and proportions, and their several and respective heirs, &c. for ever; and for and during all my estate, &c. therein, as *tenants in common*, and not as joint tenants, the annual income of such as shall be under age shall be applied in their maintenance: and in case any of my children shall happen to die either before or after my said son James shall attain the age of twenty-one years, or die under that age, leaving issue of his or her body living, then the share or shares of him or her so dying, whether a son or daughter, according to the proportions aforesaid, shall be and enure to the use and behoof of the issue of such of them so dying for ever, or for and during all my then estate, &c. therein respectively; and in case any of my children shall die under the age of twenty-one years, either before or after my said son James shall attain the age of twenty-one years, or die under that age, and without leaving lawful issue, then the share of him, her, or them, so dying, whether son or daughter, shall be and enure to and to the use for ever of the survivors and survivor of them, their heirs, executors, &c. in the same proportions as their original share and shares; and in case all and every my said child or children shall happen to die under the age

of twenty-one years, and without leaving lawful issue, then to the use and behoof of my nephews and nieces, children of my late brothers John and James, and my sisters Mary and Elizabeth, and their several and respective heirs, &c. for ever, and for and during all my then estate, &c. therein respectively, and according to the nature and quality thereof respectively, to hold as tenants in common, and not as joint tenants, in the same shares and proportions with respect of males and females, and with the same preference or partiality to males, and with the same limitations to the issue of any of them happening to die, leaving issue then living, as is hereinbefore by me limited and apportioned of and concerning my own sons and daughters"—with an ultimate limitation to the right heirs of the testator.

And as to all the residue and remainder of the monies arising from the trust property, rents, profits, and accumulations undisposed of, the testator directed the trustees, as soon as his said son James should have attained the age of twenty-one years, or should die under that age, to pay, assign, transfer, and deliver the same unto and amongst all and every his children who should be then living, in the same shares and proportions with respect of boys and girls, and with partiality or preference to boys, as was thereinbefore by him directed and declared of and concerning the division of his real estates as aforesaid, and in case any of his said children should be then dead, leaving issue then living, then the issue of such of them dying should have and be entitled to the share and proportion of the parent or parents so dying, with a similar limitation as in the case of freeholds and leaseholds in favour of the nephews and nieces, in the event of all the testator's children dying under twenty-one and unmarried.

The testator's son James attained the age of twenty-one in his lifetime: his son William died, leaving issue a son and daughter, the latter of whom afterwards died an infant. Five days before his death, the testator published a codicil, in which was a recital, that by his will the children of his son William would amongst them have and be entitled to an equal share with each of his other sons. At the time of his death the testator had four sons and four daughters living: Held, first, that under the above will and codicil, the children of the testator living at the time of his death took an estate in fee in six-sevenths of the freehold lands, and the whole interest in six-sevenths of the leaseholds, as tenants in common, in the proportion, as regarded males and females, appointed by the will in favour of the males; with an executory devise in the event of the death of any of the said children leaving issue, of the share of each such child so dying to the issue of such child, as joint tenants in fee, in equal shares; and with an executory devise in the event of the death of any of the said children under the age of twenty-one, leaving issue, of the share of each such child so dying as last aforesaid, to the surviving children of the testator, as joint tenants in fee, in the like proportions as regarded males and females as was provided with respect to the original shares, and that the children of the testator's son William took an estate in fee in one-seventh of the freehold lands, and the whole interest in one-seventh of the leaseholds, as joint tenants in equal shares. Secondly, that the estate and interests of the testator's children living at his death (with the exception of such as took effect by way of executory devise), and the estate and interests of the children of his deceased son William, vested in them on the testator's death; that the executory interests of the issue of such of the children of the testatator on the death of their parent, and that the executory interests to arise to the surviving children of the testator without leaving issue vested in them respectively on the death of such children without leaving issue.

Thirdly, that the children of the testator living at the time of his death took six-sevenths of the residuary personal property of the testator, consisting of monies arising from the trust property, rents, profits, and accumulations undisposed of absolutely, as tenants in common, in the proportions before mentioned, and that the children of William took one-seventh of the same residuary personal property absolutely, as joint tenants, in equal proportions. Fourthly, that the widow of William, the testator's eldest son, took no interest in the same residuary property, either as widow or administratrix of the estate and effects of her deceased daughter. Joseph, the eldest son of the testator by his second wife, by his will charged all and every his lands, &c. whatsoever and wheresoever situate, with an annuity of 100*l.* to his widow, in lieu and full satisfaction of and for dower. He survived his father, and died, leaving a son: Held, that this annuity was not chargeable upon the share of Joseph of and in the lands and hereditaments devised by the will and codicil of his late father (the original testator), but that the same was chargeable upon his share of and in the residuary property of the testator, consisting of monies arising from the trust property, rents, profits, and accumulations undisposed of.—*Radley* v. *Lees*, 3 Scott, N. R. 665.

3. (*Of copyholds—Fee simple conditional—Devise to illegitimate children.*) The testator being seised in fee of certain freehold land, and also of copyholds of the manor and forest of Knaresborough (which copyholds were not by custom entailable), after devising a freehold estate at H. "to the child or children which his wife should bear to him, their heirs, and assigns," proceeded as follows:—I give, devise, and bequeath to my son Dr. J. S., his heirs and assigns for ever (the copyholds amongst other property), but if it shall happen my said son Dr. J. S. shall die without leaving child or children, in that case I give, devise, and bequeath all the before mentioned estates, &c. unto my five children (illegitimate — naming them), their heirs and assigns for ever, to be equally divided amongst them, share and share alike, and if any of my said five children should die before they come of age, without issue, such share of him, her, or them so dying, shall go equally amongst the survivors: My will also is, and I hereby order and direct, that if my present wife, E., should leave no issue to inherit the freehold estate at H., that all the said estate (at H.) shall be subject to the same mode of distribution amongst my aforesaid five children as all the other property above mentioned given and bequeathed to my said son Dr. J. S., in case he die without issue:" Held, that if the lands had been of freehold tenure, Dr. J. S. would, under the above devise, have taken an estate tail, with remainder over to the five illegitimate children, the words "child or children" being used in the sense of "issue" generally, but that the lands being copyhold, incapable of being entailed, he took a fee simple conditional, on which no remainder could be limited.

And held, that the circumstance of the lands being copyholds incapable of being entailed afforded no ground for holding the devise to the five illegitimate children to be an executory devise, to take effect in the event of Dr. J. S. dying without any child living at his decease.—*Doe* d. *Blesan* v. *Simpson*, 3 Scott, N. R. 774.

4. (*Seisin of devisee necessary to enable him to transmit estate.*) A., by his will, devised premises to the infant daughter of his sister in fee. The infant devisee died before entry, and before obtaining any actual seisin or possession. Held, that she had such a seisin in law of the demised premises as to enable her heir to take them from her by descent. (Co. Litt. 111 a; Hale's Hist. of Com. Law

c. 11; Fitz. N. B. 199; Cro. Car. 200.)—*Doe* d. *Parker* v. *Thomas*, 4 Scott, N. R. 449.

DOG MATCH. See GAMING.

EJECTMENT.

1. (*Service.*) In ejectment for a part of the bed of a canal, service of the declaration on the clerk of the Canal Company at their office was held sufficient for a rule nisi for judgment against the casual ejector. (Barnes, 181; 2 Chit. R. 181.)—*Doe* d. *Fisher* v. *Roe*, 10 M. & W. 21.

2. (*Title of declaration.*) The Court of C. P. granted a rule for judgment against the casual ejector, though the declaration was not entitled in any Court, the notice requiring the tenant to appear in the Common Bench.—*Doe* d. *Gibson* v. *Roe*, 4 Scott, N. R. 434.

3. (*Same.*) The declaration described the lessor of the plaintiff as H. J. F., at the time of the demise called H. J.; the affidavit of service described him only as H. J. The variance was held immaterial.—*Doe* d. *Fust* v. *Roe*, 1 D. P. C. (N. S.), 879.

EVIDENCE.

1. (*Examination of bankrupt before commissioners.*) In trespass by assignees of a bankrupt for seizing a ship and rudder, the plaintiffs, in order to prove the taking, produced an examination of the defendant before the commissioners under the fiat, in which the fact was admitted. In this examination was set out an agreement between the bankrupt and the defendant, under which the defendant claimed to be entitled to the possession of the ship. Held, that this agreement could not be rejected, though not otherwise proved, and though it was produced before the commissioners on the cross examination of the defendant by his own attorney.—*Goss* v. *Quintin*, 4 Scott, N. R. 471.

2. (*Of identity of defendant.*) An action being brought against William Henderson for negligently navigating a vessel, and the circumstances under which the collision took place having been proved, it was objected that no evidence had been given that the defendant was the pilot in charge of the vessel, whereupon the plaintiff's counsel called out, "Mr. Henderson!" upon which a person in Court answered "Here;" and said, "I am the pilot." It was proved by one of the witnesses who had gone on board the vessel at the time of the accident, that he had seen that person then acting as pilot: Held, that this was sufficient evidence of the identity of the defendant with the pilot.—*Smith* v. *Henderson*, 9 M. & W. 798.

3. (*Notice to produce, when too late.*) A notice to produce was served on the defendant's attorney at his residence, twenty miles from the place of trial, at eight p.m. on the night before the trial. The defendant resided in the same town with the attorney, but was not at home on that evening until twelve o'clock: Held, too late.—*Howard* v. *Williams*, 9 M. & W. 725; 1 D. P. C. (N. S.), 877.

And see FRAUDS, STATUTE OF, 1, 3; GAMING.

EXECUTOR AND ADMINISTRATOR.

1. (*Rights of English administrator as to bona notabilia in Ireland.*) Held, in the Exchequer Chamber, reversing the judgment of the Court of Queen's Bench, that letters of administration from the Archbishop of Canterbury are sufficient to enable a person to sue, in this country, on an indenture which, at the time of the intestate's death, was in Ireland.—*Whyte* v. *Rose*, 2 G. & D. 312.

2. (*Right of executor to contract for his co-executors.*) To an action for use and occupation, for a quarter's rent from Lady-day to Midsummer, 1841, the defendant pleaded, that by an agreement made between the plaintiffs, executors of T., and the defendant, the defendant agreed to take of the plaintiffs, executors as aforesaid, the premises in question; that it was afterwards agreed between them and W., that W. should become tenant to the plaintiffs from Lady-day, 1841, and that the defendant should be discharged from all liability to subsequent rent; that the defendant accordingly gave up possession to W., and the plaintiffs accepted him as tenant: Held, that this plea was not proved by evidence that one of the plaintiffs had so agreed to accept W. as tenant in lieu of the defendant.—*Turner* v. *Hardey*, 9 M. & W. 770; 1 D. P. C. (N. S.), 954.

And see JUDGMENT.

FACTOR. See TROVER.

FINES AND RECOVERIES ACT.

1. (*Conveyance by married woman—Affidavit of wife.*) An order to enable a married woman to make a conveyance of her property without her husband's concurrence, under stat. 3 & 4 W. 4, c. 74, s. 91, cannot be made without an affidavit from her, negativing any communication from him. (1 Man. & G. 881.) But where a delay until the following term would have caused great inconvenience to the parties, the Court gave directions for the order to be drawn up in vacation, on the production of an affidavit from the wife.—*In re Horsfall*, 3 Man. & G. 132.

2. (*Certificate of acknowledgment of married woman.*) The Court permitted a certificate of acknowledgment, under 3 & 4 W. 4, c. 74, to be filed, although the affidavit to excuse the want of a notarial certificate (which was sworn by one of the commissioners taking the acknowledgment, and was in other respects sufficient) erroneously stated that the affidavit verifying the certificate was sworn by the other commissioner, when in fact it was sworn by the deponent himself.—*In re Taylor*, 4 Scott, N. R. 328.

3. (*Same.*) The Court permitted a certificate of acknowledgment (taken at Philadelphia), under 3 & 4 W. 4, c. 74, to be received and filed, notwithstanding the affidavit of verification did not precisely conform to the rule of Court of Hilary Term, 4 W. 4.—*In re Shaw*, 3 Scott, N. R. 647.

FOREIGN JUDGMENT.

(*Remedy for costs given by.*) An action of assumpsit or debt may be maintained against a defendant resident in this country, for costs awarded against him, after appearance, by a decree of the Court of Session in Scotland, in a suit for a divorce. (2 H. Bl. 248.)—*Russell* v. *Smyth*, 9 M. & W. 810; 1 D. P. C. (N. S.), 929.

FRAUDS, STATUTE OF.

1. (*Contract not to be performed within a year—Parol evidence to explain written contract.*) The following memorandum was made between the plaintiff and defendant, and signed with their respective initials: "Dict. of Practice. 80*l.* per annum for five years, commencing Michaelmas, 1828, 60*l.* per annum for the rest of Mr. L.'s life, if he survive the five years; payable in either case quarterly; the first payment Michaelmas, 1828; Mr. L. to separate the Practices, K. B. and C. P:" Held, that parol evidence was admissible to explain this memorandum; but that, inasmuch as it appeared to be a memorandum of a contract not

to be performed within a year, and no consideration was stated on the face of it, it was within the fourth section of the statute of frauds, and could not be enforced by action.

Held also, that the plaintiff, who had paid the annuity for several years under this memorandum, could not, on the defendant's setting up the above objection to its legality, recover back the money as on a failure of consideration.—*Sweet* v. *Lee*, 4 Scott, N. R. 77.

2. (*Memorandum within sect.* 4.) Pursuant to a resolution of the Board of Directors of a Gas Light Company, of the 12th March, 1839, an advertisement was published for tenders for the conveyance of coals from vessels in the Pool to the company's wharf, for a term of three years, from the 25th March then next. The plaintiff sent in a tender, which, by a resolution of the directors of the 26th March, was accepted. An agreement was prepared, and submitted to and approved by a meeting of the directors of the 2d April, and they directed their secretary to forward a fair copy to the plaintiff, which was done. The agreement stated in the usual way the names of the contracting parties, and at the end were these words, "As witness our hands;" but it was never in fact signed: Held, that this was not an agreement, or memorandum or note thereof, in writing, signed by the parties to be charged thereby, &c. within the fourth section of the statute of frauds.—*Hubert* v. *Turner*, 4 Scott, N. R. 486.

3. (*Entry in broker's book, when evidence of contract of sale.*) Assumpsit for goods sold and delivered. It appeared at the trial that a broker, employed by the plaintiffs to sell 200 casks of tallow, sold 50 to the defendant, and the remainder to two other parties, to be delivered some months subsequently to the sale. In the bought note he described the transaction as a purchase of 50 casks for "his principals," i. e. the buyers; and in the sold note, as a sale of 200 casks sold to his principals. In his book he stated the defendant as the purchaser of 50 casks, and the two other parties as purchasers of the remainder. There was no disclosure of the principals on either side. About the time appointed for the delivery, the broker urged the defendant to buy 100 other casks of a third person, and on the latter objecting to do so, on the ground that the 50 casks already contracted for by him would soon be delivered, offered to "put off" those casks. The 50 casks were never actually delivered to the defendant. It was objected, on this evidence, that the plaintiff ought to be nonsuited, on two grounds: first, that inasmuch as there was a variance between the bought and sold notes, the broker's book not being evidence of the contract, there was no valid contract; secondly, that there was nothing to show any delivery of the 50 casks to the defendant. The learned judge being of that opinion, nonsuited the plaintiffs: Held, that the nonsuit was wrong on the second ground, it being a question for the jury, whether the words "put off" meant a sale of the goods to a third person by the broker on account of the defendant, or a postponement of the delivery with or without the consent of the plaintiffs.

Quære, whether the memorandum of a sale in the broker's books, signed by him, is admissible as evidence of the contract, to satisfy the statute of frauds, in cases where there is no other written contract, or where the bought and sold notes disagree. (2 Campb. 337; 5 Taunt. 786; Moo. & M. 44; 5 B. & C. 436; 6 B & C. 117; 1 M. & Rob. 368.)—*Thornton* v. *Charles*, 9 M. & W. 802.

FREIGHT.

Goods were shipped at Bombay on board a ship of the plaintiff, a shipowner in Liverpool, and by the bill of lading were to be delivered "unto order, or to his

and their assigns, on paying freight for the same." The bill of lading was indorsed by the shipper, and forwarded to defendants, East India agents in London, who indorsed it in blank to C. & Co., their factors in Liverpool. On the arrival of the goods at Liverpool, C. & Co. presented the bill of lading to the plaintiff, and received the goods; the plaintiff debiting C. & Co. with the freight. Afterwards C. & Co. became bankrupt without having paid the freight, whereupon the defendants claimed the goods from them, and took possession of them: Held, on error brought upon the judgment of the Court of Exchequer, that the defendants were not liable to the plaintiff for the unpaid freight; affirming the judgment of the Court below.—*Tobin* v. *Crawford*, 9 M. & W. 716.

GAMING.

(*Coursing match for upwards of* 10*l. illegal—Agreement for, construction of—Evidence—Pleading.*) A coursing match is a game within the meaning of the 9 Anne, c. 14, s. 3, and an agreement to run such a match for more than 10*l.*, or to forfeit the same amount in default of running it, is an illegal agreement, and an action for the penalty for not running the match cannot be sustained.

The objection, that the match was illegal under the 16 Car. 2, c. 7, s. 2, cannot be taken unless pleaded specially, although the objection appears on the plaintiff's case.

The plaintiff and defendant made an agreement in writing to run a match with greyhounds "on the Wednesday during the Newmarket February meeting, 1841." It appeared that the Newmarket meetings were meetings of a coursing club; that the power of appointing and adjourning meetings was vested in the stewards, who were governed by printed rules; and that the practice of the club was to hold the February meeting on the first Tuesday in that month, weather permitting; but if the weather prevented its being then held, to adjourn it to a future day, weather permitting. At the time when the contract was made, the day appointed for the February meeting was Tuesday, the 2nd February, 1841. On Wednesday, the 3rd, the plaintiff and defendant were there, but frost prevented the meeting from being then held, and it was adjourned to Tuesday the 9th, and again, from the same cause, to Tuesday the 16th, when it was held. On Wednesday, the 17th, the plaintiff was ready with his dog to run the match, but the defendant made default.

Held, first, that the true construction of the contract was, that the match should be run on the Wednesday during the February meeting, whenever it should be actually held, and therefore that the plaintiff performed his part of the contract by being ready to run on Wednesday the 17th.

Secondly, that the plaintiff was not bound to produce the printed rules, but it was enough for him to show that the February meeting was then actually held.

Held, also, that evidence was admissible to show the meaning of the words "P. P." subjoined to the agreement.—*Daintree* v. *Hutchinson*, 10 M. & W. 85.

HIGHWAY ACT.

(*Jurisdiction of justices under—Pleading.*) In replevin for seizing the plaintiff's goods, the defendant pleaded in justification, that after the passing of the stat. 5 & 6 W. 4, c. 50, (the General Highway Act), two justices made their warrant (setting it out), addressed to the surveyor of the highways and the constable of H., reciting that M., an occupier of lands in H., was duly rated to the repair of the highways of the parish in a certain sum therein mentioned, which had been demanded and refused, and that he had been summoned and had not appeared, and therefore the warrant commanded them to levy the amount by distress and sale. The plea then averred that the defendant was constable of H., that certain

persons mentioned in the warrant were surveyors of the highways, and that M. was the plaintiff, and so justified under the warrant, on the ground that the defendant was acting in aid and assistance of the surveyors, under the warrant: Held, on general demurrer, that the plea was bad, whether under the statute or at common law; for that it did not show that the justices had jurisdiction over the subject-matter on which the warrant was granted.—*Morrell* v. *Martin*, 4 Scott, N. R. 300.

HORSE RACE.

A party who enters and runs in a race an unqualified horse, is not entitled to recover back the subscription paid by him, as upon a failure of consideration.—*Goldsmith* v. *Martin*, 4 Scott, N. R. 620.

HUSBAND AND WIFE.

1. (*Right of set-off to claim of husband and wife in right of wife.*) To an action of debt by husband and wife, in right of the wife as executrix, for money had and received, the defendant pleaded, as to 35*l.*, that that sum was part of the prices received by him on the sale of two horses of the testator, which were in the hands of the plaintiffs to be administered, and which, under an authority given by them to the defendant, were sold by him in his own name, and warranted sound to the respective purchasers (naming four persons); that at the time of the sales the horses respectively were unsound; that the defendant, from the time of the receipt of the money until he paid the same as thereinafter mentioned, was indebted to the plaintiffs in the sum of 35*l.*, payable on request, for the said money so received by him to their use, and always was ready and willing to pay it to them; and that after he so became indebted, and before the commencement of the suit, he was, by reason of the breaches of the warranties as to the said horses, compelled by the purchasers, without any fault on his part, to repay to them the said sum of 35*l.*, and the residue of the prices, whereby the said debt of 35*l.* was discharged: Held, on special demurrer; that the plea was no answer to the action.—*Field* v. *Allen*, 9 M. & W. 694.

2. (*Liability of widow for goods supplied after husband's death abroad.*) Where a man who had been in the habit of dealing with the plaintiff for meat supplied to his house, went abroad, leaving his wife and family resident in this country, and died abroad: Held, that the wife was not liable for goods supplied to her after his death, but before information of his death had been received; she having had originally full authority to contract, and done no wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge relating to it; the revocation itself being by the act of God, and the continuance of the life of the principal being equally within the knowledge of both parties.—*Smout* v. *Ilbery*, 10 M. & W. 1.

And see Fines and Recoveries Act.

INCLOSURE ACT.

(*Construction of.*) Under an inclosure act, the plaintiff preferred a claim before the commissioner in respect of certain copyhold and freehold rights, and also a claim "for and in right of the whole above freehold estate, and all the freehold which formerly belonged to the manor farm, a separate right of feeding and folding an unlimited number of sheep exclusively in his own use, called the manor flock, having and exercising equal rights of pasturage in every respect with the town flock, over, in, and upon all the open fields and commons of R., and which had been the custom from time immemorial." This latter branch of the claim

being objected to, and the plaintiff being dissatisfied with the determination of the commissioner, an issue was settled by one of the masters in the terms of that claim. At the trial, the judge (with the assent of both parties) directed the issue to be found for the defendant, reserving leave to enter the verdict for the plaintiff, in case the right being found by the jury to be that the plaintiff had a right of common of pasture for sheep levant and couchant on the land now occupied by him (about one-third of that which originally composed the manor farm), the judge ought to have directed the verdict to be found for the plaintiff, or in case the Court should think that under the circumstances he ought to have directed a verdict for the plaintiff under the rules of Hilary Term, 4 W. 4, c. 5, ss. 4, 5, 6: Held, that the verdict was properly found for the defendant, and that the rules in question did not apply to such a case. And the Court refused to permit the issue to be amended and retried.—*Ivatt* v. *Mann*, 4 Scott, N. R. 342.

INDICTMENT.

(*Venue—Offence laid in one county and tried in another.*) A bill of indictment, venue, "Borough of Stamford," was found at the quarter sessions of that borough. The indictment stated that the defendant A., "of the parish of M., in the county of Northampton, and within the borough of Stamford, constable, on &c., at the parish aforesaid did &c."

The defendants removed the indictment by certiorari, a venue was awarded into Lincolnshire, and the defendant was found guilty at the assizes for that county.

The borough of Stamford is partly in Lincolnshire and partly in Northamptonshire. The offence charged was committed in that part of the borough which is in Northamptonshire, within 500 yards of the Lincolnshire boundary. The borough of Stamford, in the schedules to the Boundary and Municipal Corporation Acts, is classed as being in the county of Lincoln.

Held, as it appeared a Lincolnshire venire had been awarded to try an offence laid in Northamptonshire, that judgment must be arrested.—*Reg.* v. *Mitchell*, 2 G. & D. 274.

INFORMATION.

(*Right of crown to delay proceedings in.*) In an information at the suit of the crown, notice of trial was given in Trinity Term 1838, but afterwards countermanded. The Court discharged a rule obtained by the defendants in Hilary Term 1842, to set down the cause for trial at the sittings after Easter Term.—*Regina* v. *Ray*, 9 M. & W. 760.

INSOLVENT.

1. (*Fraudulent conveyance within* 1 & 2 *Vict. c.* 110, *s.* 59.) Where a person in insolvent circumstances, either after his imprisonment or within three months before his imprisonment, assigns over his property in trust for the creditors who should execute the deed, the assignment, if made without new consideration or any application by creditors, is fraudulent and void as against his assignees under the 1 & 2 Vict. c. 110, s. 59. A trader, being in insolvent circumstances, convened a meeting of his creditors, and afterwards sent instructions to an attorney to prepare a deed of assignment of his effects to the plaintiff, in trust for such of his creditors as should execute the deed. The deed contained a clause authorizing the trustee to carry on the trade for the benefit of the creditors; there was no new consideration for this deed, nor did it appear that it was executed by the insolvent under any pressure, or at the suggestion of any creditor. Under this deed the trustee took possession of the shop (the insolvent and his family con-

tinuing to reside in the shop, and not being disturbed in the possession of the household furniture and effects), and carried on the business, sending in goods from time to time. The insolvent went to prison a month after the execution of the deed, and subsequently obtained his discharge under the Insolvent Debtors Act, the defendants being appointed assignees. In trespass against the defendants for breaking and entering the shop, and seizing and selling his goods: Held, that the assignment was voluntary within 1 & 2 Vict. c. 110, s. 59, and therefore conferred upon the plaintiff no title in respect of which he could maintain trespass for breaking and entering the shop, but the action was maintainable in respect of the seizure and sale of the plaintiff's goods.—*Thompson* v. *Jackson*, 4 Scott, N. R. 234.

3. (*Estate of assignee—Evidence of assignee's title.*) The assignee of an insolvent debtor, on his acceptance of the appointment, has vested in him all the estate of the insolvent from the date of the vesting order.

And in trover by such assignee, for a conversion of part of the insolvent's estate before his appointment, and in the time of the provisional assignee, a copy of the adjudication of the prisoner's discharge, certified pursuant to the stat. 1 & 2 Vict. c. 110, s. 105, showing the date of the vesting order, is good evidence of the plaintiff's title.

But the order of appointment of the assignee is not evidence of the time from which his title accrues, but only of the appointment itself.—*Yorke* v. *Brown*, 10 M. & W. 78.

3. (*Form of plea of discharge under Insolvent Act.*) A plea of the plaintiff's discharge under the Insolvent Debtors Act must aver that the vesting order was made before the commencement of the suit.

But it need not allege that the petition was not dismissed, that the vesting order is still in force, or that the petition was filed and the vesting order made after the stat. 1 & 2 Vict. c. 110, came into operation.—*Tucker* v. *Webster*, 1 D. P. C. (N. S.) 961.

INSURANCE. See PLEADING, 7.

INTERPLEADER ACT.

1. Where a rule for a new trial upon an issue under the Interpleader Act is made absolute on payment of costs by the defendant, the latter is bound to draw up the rule promptly.—*Chase* v. *Goble*, 4 Scott, N. R. 317.

2. (*Remedy for costs of interpleader order.*) A party entitled to costs under an interpleader order, is not bound to take out execution under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 7, but may make the order a rule of Court, and take out execution under 1 & 2 Vict. c. 110, s. 18.—*Cetti* v. *Bartlett*, 9 M. & W. 840; 1 D. P. C. (N. S.) 928.

JOINT STOCK COMPANY. See PARTNERSHIP, 2.

JUDGMENT.

(*Priority of judgments—Docketing.*) A judgment against an executor (before the 2 & 3 Vict. c. 11) is entitled to preference in the administration of the testator's estate over simple contract debts, though not docketed pursuant to the 4 & 5 W. & M. c. 20.—*Gaunt* v. *Taylor*, 3 Scott, N. R. 700.

JUSTICES OF THE PEACE. See HIGHWAY ACT.

LANDLORD AND TENANT. See NOTICE TO QUIT.

LEASE. See PLEADING, 8.

LIEN. See DETINUE.

LIMITATIONS, STATUTE OF. See PLEADING, 12.

LIGHTING AND WATCHING ACT.

(*Voting under.*) Under the general lighting and watching act, 3 & 4 W. 4, c. 90, a majority of two-thirds of the rate-payers of a parish is required only at the original meeting to be held under the 9th section, for determining as to the adoption of the act, and as to the amount which the inspectors shall have power to call for in any year: but where the parish has adopted the provisions of the act, a majority of two-thirds is not necessary in order to determine the amount to be raised for the purpose of the act in a subsequent year, under s. 18, but the resolution of a simple majority of the rate-payers voting at the meeting called for that purpose, or, in case of a poll being demanded, of the rate-payers voting upon it, is sufficient.—*Beechey* v. *Quentery*, 10 M. & W. 65.

LUNATIC.

(*Service of distringas on.*) The Court allowed an appearance for a lunatic defendant to be entered, after service of a distringas on the keeper of the asylum in which the lunatic was confined, he refusing to allow the defendant to be seen, on an affidavit of notice to the keeper of the plaintiff's intention to enter an appearance. (6 M. & W. 89.)—*Dodson* v. *Warne*, 1 D. P. C. (N. S.) 848.

LUNATIC ASYLUM.

By 9 Geo. 4, c. 40, ss. 30 and 32, the act for the regulation of Lunatic Asylums, visiting justices have the power of appointing and dismissing the chaplain of the asylum.—*Reg.* v. *Visiting Justices of Middlesex Lunatic Asylum*, 2 G. & D. 300.

MALICIOUS ARREST. See ARREST, 1.

MANDAMUS.

(*Damages and costs in—Who are prosecutors.*) Mandamus to parish officers to produce the parish rates and books at the scrutiny of a poll which had been taken for the election of churchwardens, overseers, and surveyors. The writ stated the refusal of the defendants to be to the damage of the parishioners, and the complaint to be by them. The inducement recited certain facts concerning the polls; and return was made denying these facts. Two parishioners, for themselves and the other parishioners, entered traverses on these denials, upon which issues were joined, and found at the trial for the crown. Held, by the Court of Exchequer Chamber on error, that as against the defendants on this record, it must be held that the two parishioners were the prosecutors. Held also, (affirming the judgment of the Court of Queen's Bench,) that the stat. 1 Will. 4, c. 21, ss. 3, 6, applies to all writs of mandamus, and entitles prosecutors recovering on a traverse to damages and costs, whether or not they be so interested as to have been entitled to sue in case for a false return; and that the two parishioners, as prosecutors, were entitled to damages and costs.—*Reg.* v. *Fall*, 1 Ad. & El. (N. S.) 636.

MONEY HAD AND RECEIVED. See BANKRUPTCY, 2; HORSE RACE; PRINCIPAL AND AGENT.

MONEY LENT.

(*When maintainable—Alternative contract.*) Money advanced upon a contract to

repay it on demand, or to execute a mortgage, may, after refusal to execute a mortgage, be recovered back under a count for money lent.—*Bristowe* v. *Needham*, 9 M. & W. 729.

NAVIGATION ACT.

(*Construction of—Levying of rates under—Weights and Measures Act.*) Where by a navigation act certain rates and duties were imposed on coals, &c., landed within a certain district, to be paid to commissioners therein named; and the commissioners were empowered to sue in the name of their clerk for the time being, for "any penalty or sum of money due or payable by virtue of the act:" Held, that an action of debt might be brought in the name of the clerk for arrears of rates and duties; although, by another clause, a power was given of detaining and selling the vessel and goods in case of neglect or refusal to pay the rates and duties.

The act directed, that any surplus of rates remaining in the hands of the commissioners should be annually invested in the funds until it should amount to 3000*l.*, and that after that sum should be invested they should reduce the rates, so as they should not, together with the dividends of the 3000*l.*, exceed the charges annually expended in carrying the act into execution. Held, that the commissioners had impliedly a power, after so reducing the rates, also to raise them again in case of necessity.

Held, also, that after the passing of the Weights and Measures Act, 5 & 6 Will. 4, c. 63, the commissioners had power to levy the rates by the *ton* (they having been previously levied by the *chaldron*), without first applying to the sessions for an inquisition under the 14th section of that act.—*Goody* v. *Penny*, 9 M. & W. 687.

NOTICE TO QUIT.

Defendant held premises of plaintiff under a void agreement for a term of five years *and a half*, from Michaelmas, 1823. Before the expiration of that time, the parties entered into a negociation for a further lease for seven, fourteen, or twenty-one years, at an increased rent, in consideration of the plaintiff's laying out money in improvements. No lease was ever executed, but the defendant continued in the occupation of the premises, paying the increased rent from Michaelmas, 1828, down to the year 1835: Held, that a notice given at Lady-day, to quit at Michaelmas, was a good notice.—*Berrey* v. *Lindley*, 4 Scott, N. R. 61.

ORDER OF REMOVAL.

1. (*Statement of grounds of appeal.*) The examination of a pauper, after stating a settlement gained about twelve years since, on which he was removed from the parish of Stowford, proceeded thus: "I then went to Stowford, and lived with Mr. Jackman there, under a yearly hiring for eleven months and a fortnight."

On appeal against the order of removal, the grounds stated were: "Because the pauper acquired a settlement in the said parish of Stowford, subsequently to that acquired by him in our parish: because the pauper acquired a settlement in the said parish of Stowford, by hiring with one Mr. Jackman, from Lady-day to the following Lady-day, and the service under the same in that parish accordingly, subsequently to that acquired by him in our parish."

An objection made on the trial of the appeal, that the appellants could not go into their case, because in their grounds they had not stated the time of the hiring and service, or the residence of the pauper, in the respondent parish, was overruled by the sessions.

Held, on a case from the sessions, that their decision was wrong, and that the defect in the grounds of appeal was not supplied by reading them with the examination, as they did not state that the service alleged by them with one Mr. Jackman was with the same person who was described in the examination.—*Reg.* v. *Inhabitants of Stowford*, 2 G. & D. 390.

2. (*Examination—Jurat—Grounds of appeal.*) The examination on which an order of removal was made, appeared in the body and in the jurat to have been taken before a single justice; the examination contained the words, "The examination of A. B., taken before me, one of her majesty's justices," &c., and the jurat contained the words, "sworn before me, and I do hereby certify that the above examination was read over," &c. The examination, however, was signed by *two* justices.

The order was appealed against, and the ground of appeal was, "the examination on which the order is founded is bad, inasmuch as, though signed by two justices, it purports to have been taken by one justice only." The sessions held the objection good, and quashed the order: but the Court of Q. B., on a case stated, held that, as upon the face of the examination it was doubtful whether the examination purported to have been taken before one or two justices, and as the grounds of appeal did not object that the examination had not in fact been taken before two justices, the maxim "omnia ritè esse acta" was fairly applicable, and quashed the order of sessions.—*Reg.* v. *Inhabitants of Silkstone*, 2 G. & D. 396.

PALACE.

(*Assessment of sewers' rate on.*) An information of intrusion stated, that the defendants intruded and made entry on a certain messuage or dwellinghouse, situate &c., and being parcel of the royal palace of Kensington, then *in the occupation of* our Lady the Queen, and which was in the hands and possession of the Queen in right of her Crown. The defendants pleaded, in the form given by the statute 23 Hen. 8, c. 5, s. 11, that they committed the trespasses under the authority of a commission of sewers, for tax assessed by the said commission: Held, on demurrer, that this form of plea was not allowable in an information of intrusion at the suit of the Crown.

A distress cannot be levied for sewers' rates within the precincts of a royal palace, occupied as a residence of the sovereign; and Kensington Palace is within this description.

But *semble*, that the averment in this information did not sufficiently show the palace to be the residence of the sovereign.—*Att. Gen.* v. *Donaldson*, 10 M. & W. 117.

PARISH CLERK. See CHURCHWARDENS.

PARTNERSHIP.

1. (*Authority of partner to accept bills for the firm—Pleading.*) In assumpsit against two defendants, as acceptors of a bill of exchange, drawn on them by plaintiff, one defendant, C., pleaded that he and the other defendant were partners, and as such had accepted divers bills of exchange for partnership purposes; that the other defendant accepted the bill in question in the name of the co-partnership, in fraud of him, C., and not for the partnership, but for his own private purposes, and without the consent of C., and that there never was any consideration or value received by C., for the acceptance or the payment thereof, and that

the plaintiff at the times of drawing and accepting the bill had notice of all the premises.

Held, on special demurrer, that, as the plea alleged notice to the plaintiff at the very time when the bill was accepted, that the implied authority of his co-partner to bind C. by the acceptance did not exist as to the particular bill, the plea contained no confession of the acceptance in fact, and was therefore bad as an argumentative traverse of the acceptance by C., alleged in the declaration.—*Jones* v. *Corbett*, 2 G. & D. 308.

2. (*In joint stock company—Promissory note made by directors in their own names.*) By a deed dated 7th May, 1839, a company was formed called the West Mining Association, of which the defendants were directors. The plaintiff, by an agreement dated 10th July, 1839, agreed to sell to this company 1000 shares in the Pennance Mills Mining Company, to be paid for by the sum of 1385*l.*, and by the delivering to him of 200 scrip certificates of shares in the West Mining Association. The money was to be paid on the 1st of August, 1841. Immediately upon the execution of the agreement, 200 scrip certificates were obtained by the plaintiff's agent, and entered in the register book of the West Mining Association in the plaintiff's name. The defendants afterwards gave the plaintiff the following promissory note, dated August 17, 1839: "We jointly promise to pay to J. F. (the plaintiff) 1385*l.*, on the 1st of August, 1841, for value received in Pennance shares pursuant to annexed contract." This note was signed by all the defendants in their individual names. The deed of settlement of the West Mining Company provided that holders of scrip certificates should not be considered as qualified proprietors; and that a certain proportion of the net profits of the year should be divided amongst the shareholders and scrip-certificate holders, in proportion to their several shares and interests. The plaintiff had not paid any instalments nor signed the deed of settlement, but continued to be the holder of the scrip-certificates: Held, in an action brought upon the note, that a plea that the defendants made the note as directors and on behalf of the mining co-partnership, and that the plaintiff was a partner with the defendants, was not supported by proof of the above facts.—*Fox* v. *Frith*, 10 M. & W. 131.

PATENT.

1. (*Construction of specification—Practice—Motion in arrest of judgment.*) The plaintiff obtained a patent for "an improvement in cards, for carding wool, cotton, silk, and other fibrous substances, and for raising the pile of woollen and other cloths." In his specification he stated his invention to consist in "the application and adoption of caoutchouc or India rubber, as a substitute for the fillets or sheets of leather that were commonly used in the construction of ordinary cards, and thus giving a superior elasticity and durability to cards," and in describing the mode of preparing the article, stated that "the regularity of distance and uniformity of dents or teeth of the cards were found to be better preserved by a piece of linen, commonly called brown holland, or other the like cloth, well glazed and cemented on to the back of the caoutchouc or India rubber;" that the cloth so placed rendered the action of the dents or teeth less uncertain in elastic movements;" that "the cloth so cemented to the Indian rubber or caoutchouc was to be affixed to the cylinder or board of the ordinary carding engine by nails, but if it was to be affixed by cementing (which he recommended as the best mode of applying the cards), then it was desirable to remove the cloth;" he then pro-

ceeded to show the ordinary mode of pricking or piercing holes for the reception of the dents or teeth, the mode of cutting the India rubber, &c.

The defendants subsequently obtained a patent also for "an improvement or improvements in cards for carding various fibrous substances, part of which improvements may be used as a substitute for leather;" and in their specification they stated their invention to consist in the manufacture of a new material or substance for receiving the wire teeth—which they described to be a woven fabric of a peculiar construction, soft and porous, saturated with a solution of India rubber, by being repeatedly passed through it, and then dried and submitted to pressure, the object being to obtain a fabric extremely elastic in the direction of its thickness, so as to impart elasticity to the wire teeth when set therein.

In an action for an alleged infringement by the defendants of the plaintiff's patent, by the manufacture and sale of the article so described in their specification, the defendants pleaded—first, not guilty; secondly, that the plaintiff was not the true and first inventor; thirdly, that the alleged invention was not at the time of making the patent new as to the public use and exercise thereof in England; fourthly (setting out the specification), that certain cards, that is to say, sheet cards and top cards, were, before and at the time of granting the letters-patent, cards for carding cotton and other fibrous substances, within the meaning of the letters-patent and specification, and during all that time were ordinary cards within such meaning, and in general and known use; and that the said invention was and is unfitted and useless for the purpose of construction of sheet cards and top cards, or either of them, as claimed and described in and by the letters-patent and specification, wherefore that the said letters-patent were void; fifthly, that the plaintiff did not in and by his specification, "so set out as aforesaid," particularly describe and ascertain the nature of the invention, and in what manner the same was to be performed. Issue having been joined upon these pleas, or upon the replications thereto, and the jury, after hearing a considerable body of evidence on both sides, having found for the plaintiff upon all the issues, the Court refused to disturb the verdict: And held, that the specification, as set out in the introductory part of the fourth plea, was not upon the record, so as to warrant a motion in arrest of judgment, founded on a supposed insufficiency of the invention therein described to form a subject matter of a patent. And that the invention was described in the specification with sufficient particularity. At the trial, the judge, having summed up the evidence, and left to the jury the several questions of fact raised upon the record, was requested by the defendants to put to them the following questions: first, "whether the mode adopted by the defendants of saturating the cloth with dissolved India rubber, was not known to and practised by one Hancock, before the date of the plaintiff's patent;" secondly, "whether or not, if the dents or teeth were fixed in the fillet (meaning the sheet of India rubber), and the cemented cylinder, without any linen at the back, it would answer the purpose of a sheet card:" Held, that his refusal to comply with this request was not misdirection.—*Walton* v. *Potter*, 4 Scott, N. R. 91.

2. (*Action for infringement of, several pleas in.*) In an action for the infringement of a patent for improvements in cards, the Court refused to allow the defendants to plead, that the article in respect of which the patent was granted was generally known previously, and that the alleged improvements were not an invention in respect of which a patent could lawfully be granted—and a similar plea as to part of the alleged invention—in addition to a plea that the invention

was not a new manufacture within the meaning of the statute 21 Jac. 1, c. 3.—*Walton* v. *Bateman*, 4 Scott, N. R. 397.

PAVING ACT.

(*Construction of.*) By certain local acts relating to the paving, watching, lighting, and improving the streets, &c. in the parish of St. Pancras, the commissioners were empowered to make one or more rate or rates for the purpose of paving, repairing, cleansing, lighting, and watching, upon all houses, &c. within the limits of the acts; and also one or more rate or rates for the purpose of forming, making, and enclosing, planting, ornamenting, and embellishing the centres or areas of the square in the same parish, to be laid and assessed on the houses and building to be erected and built and encompass the said squares. By the general Metropolis Paving Act, 57 Geo. 3, c. 29, s. 24, it is enacted, that it shall be lawful for the persons who, under any local act, are empowered to make rates either separately or jointly with other purposes, to make any such rates as shall be necessary for paving, &c., pursuant to the direction of the local acts, and of that act, and for the payment of debts, &c., either separately or jointly for other purposes, as to such persons shall seem reasonable; and such rates, and all rates and assessments made with respect to paving either separately or jointly with any other purpose, by virtue of any local act or that act, shall be laid upon every person who shall inhabit, &c. any messuage, &c. within any of the streets within the district: Held, that a joint rate, professing to be made by the local commissioners "for the purposes of the same acts," was bad, inasmuch as one of those purposes (the embellishing, &c. of squares) was applicable only to a particular class of persons, distinct from the body of the inhabitants.—*Douglas* v. *Chalk*, 4 Scott, N. R. 250.

PAYMENT INTO COURT. See PLEADING, 1.

PENALTY.

(*Penalty or liquidated damages.*) The plaintiff and defendant entered into an agreement for the purchase by the defendant of the plaintiff's good-will, stock, tenant-right, &c.; it was stipulated by the agreement that the plaintiff should give possession on a certain day, and in the meantime should pay the rates and taxes, and keep the defendant indemnified therefrom: and the defendant agreed to pay 100*l.* for the tenant-right, and take the fixtures at a valuation, and pay all rents, rates, taxes, &c., and to indemnify the plaintiff from the same; and lastly, the parties "mutually bound themselves the one to the other in the sum of 100*l.* as settled and liquidated damages, to be paid and forfeited without any deduction, by such of them as should make default in the premises, unto the other of them requiring the same: Held, that the sum of 100*l.* was a penalty only, and not recoverable as liquidated damages for the breach of any of the stipulations. (6 B. & C. 216; 6 Bing. 141.)—*Horner* v. *Flintoff*, 10 M. & W. 678; 9 D. P. C. 678.

PLEADING.

1. (*Sum laid under videlicet, in action on special contract—Admission by plea of payment into Court.*) In a count on a special contract, the plaintiff declared that he was engaged as a newspaper editor, "at a salary, to wit, 400*l.*, and claimed a quarter's salary as damages for dismissal without notice."

Plea, payment of £37 : 10*s.* into Court, and no damages ultra.

Replication of damages ultra, and issue thereon.

Held, that the precise sum of 400*l.* in the declaration was not in its nature material, and that as it was laid under a videlicet, the plaintiff, if the contract

had been denied, would not have been bound to prove the precise sum. (1 Stark. N. P. C. 3.) The defendant, therefore, had not by his plea of payment into Court admitted a contract for the specific salary of 400*l.*—*Cooper* v. *Blick*, 2 G. & D. 295.

2. (*Duplicity*). It is not necessary that a plea should contain two defences *well pleaded*, in order to be double; it is enough that it sets up two defences.

Plea as to 11*l.* 3*s.* 6*d.*, parcel of a sum in an indebitatus count, that defendant accepted a bill drawn on him by plaintiff for that amount, on account of the said sum, that the plaintiff indorsed the bill to B. for a good consideration, who thence and to the time of commencing the action was the holder thereof. The plea then added, that when the bill became due, the defendant paid B., then being the holder of the bill, 5*l.* in satisfaction of so much of the bill, and that B. had commenced an action against the defendant for the residue: Held bad for duplicity.—*Wright* v. *Watts*, 2 G. & D. 386.

3. (*Plea of fraud and covin, how proved.*) To a count in debt on a promissory note, the defendant pleaded that the note was obtained from him by the plaintiffs and others in collusion with him, by fraud, covin and misrepresentation, wherefore it was void in law: Held, that this plea was not sustained by evidence that the note was given by the defendant and another, as sureties for a sum advanced to a third person by the plaintiffs, who falsely held themselves out to the world as a society formed and acting under certain rules and regulations.—*Green* v. *Gosden*, 4 Scott, N. R. 13.

4. (*Joinder of plaintiffs—Loan by society.*) A promissory note was given to two individuals by name, to secure an advance to the maker out of the funds of a loan society not enrolled pursuant to the 5 & 6 Will. 4, c. 23: Held, that in suing upon the note it was not necessary to join all the members of the society. —*Bawden* v. *Howell*, 4 Scott, N. R. 331.

5. (*Rule to strike out pleas—Several pleas.*) A rule to strike out pleas allowed by a judge at chambers will not be entertained by the Court, the rule should be to to set aside the judge's order. (5 D. P. C. 305.)

To an action of trover by assignees of a bankrupt, the defendant pleaded, first, a traverse of the plaintiffs' property as assignees; secondly, that after the bankruptcy, and before the fiat, the plaintiffs' assignees, by reason of the relation of their title to the time of the bankruptcy, although not then appointed, were the owners of and entitled to the possession of the goods; that the bankrupt, subject only to their said title as assignees, was possessed of the goods, and that the defendants took them under an execution bonâ fide executed and levied against him without any notice of any prior act of bankruptcy. Semble, per Parke B., that the latter plea amounted only to an argumentative traverse of the possession of the plaintiff's assignees, and therefore that the two pleas could not be pleaded together.—*Turquand* v. *Hawtrey*, 9 M. & W. 727; 1 D. P. C. (N.S.) 925.

6. (*Frivolous demurrer.*) To a declaration in debt for nonpayment of money pursuant to a covenant in a "deed of apprenticeship," (so describing the instrument throughout the declaration), the defendant pleaded, "that the said indenture in the declaration mentioned is not his deed." On special demurrer to the plea, the Court refused to set aside the demurrer as frivolous, and intimated their opinion that the plea was bad.—*Bird* v. *Holman*, 8 M. & W. 761.

7. (*Several counts.*) Two counts on the same policy of insurance, one alleging a loss by perils of the sea, and the other a loss by barratry, cannot be pleaded

together. (2 Campb. 149.)—*Blyth* v. *Shepherd*, 9 M. & W. 763; 1 D. P. C. (N. S.) 880.

8. (*Immaterial traverse—Traverse, when too large—Averment of readiness and willingness, when sufficient—Averment of title.*) The declaration stated, that the plaintiff, before and at the time of the agreement thereinafter mentioned, was lawfully possessed for the residue of a term, whereof twenty-one years from the 24th June, 1841, were then unexpired, of a certain dwelling-house; and thereupon on the 21st March, 1841, by an agreement made between the plaintiff and defendant, it was agreed that the plaintiff should, on or before the 24th June, 1841, let the same to the defendant, by a lease to be granted to the defendant for twenty-one years, the said term to commence from the 24th June, 1841. The declaration then stated general performance by the plaintiff, and that he was ready and willing to let the house to the defendant, and to grant and execute a lease; yet that the defendant did not nor would not become his tenant, or accept the lease. Pleas, first, that the plaintiff was not lawfully possessed of the house, for the residue of the said term, modo et formâ; secondly, that the plaintiff, at the time of the agreement, had not a good title to, and could not, on the 24th June, legally let the house to the defendant, or grant a lease for the said term: Held, on special demurrer, that the first plea was bad, as containing an immaterial traverse; and that the traverse in the second plea was too large, as it included the title of the plaintiff at the time of the contract, as well as at the time when the lease was to be granted: Held, also, that on general demurrer, the averment of the plaintiff's readiness and willingness to grant the lease was equivalent to an averment of his having a title to grant it.—*De Medina* v. *Norman*, 9 M. & W. 820.

9. (*Plea in abatement in action of tort.*) In an action on the case against a bailee of goods delivered to him for reward by the plaintiff, containing some counts charging a misuser of the goods, whereby they were lost to the plaintiff, and other counts in trover, the defendant cannot plead generally in abatement, that they were the goods of the plaintiff and other persons.

A plea in abatement for the misjoinder of parties, pleaded to several counts, if bad as to any of them, is bad altogether, and there must be a general judgment of respondeat ouster; although it would have been good if pleaded separately to the other counts. (2 Bos. & P. 420.)—*Phillips* v. *Clagett*, 10 M. & W. 192.

10. (*Several pleas.*) Where a defendant had pleaded two pleas to the same cause of action alleged in the declaration, one of which was disallowed by a judge, and he afterwards pleaded the same pleas to different parts of the same cause of action, the Court refused to set them aside.—*Daniels* v. *Lewis*, 1 D. P. C. (N. S.) 844.

11. (*Duplicity.*) If a plea be double, the replication may answer each matter of defence.

In debt against the sheriff for an escape, the defendant pleaded that he sent his warrant to G., who acted in the execution thereof under the direction of the plaintiff, and as his special bailiff; that G., without the defendant's authority, permitted the debtor to go at large, and that defendant had no notice of the escape until the debtor voluntarily returned into custody. Replication, as to so much of the plea as related to G. having acted in the execution of the warrant, that he did not act under the direction of the plaintiff, and as to so much of the plea as related to the debtor having returned into custody, that the defendant of

his own wrong suffered him to go at large. Semble, that the plea was not double, the latter allegation being surplusage: and that the replication was informal and ambiguous.—*Pascoe* v. *Vyvyan*, 1 D. P. C. (N.S.) 939.

12. (*Plea of statute of limitations to the "supposed" cause of action.*) A plea that "the said *supposed*" causes of action did not accrue to the plaintiff within six years, held good on special demurrer. (1 Ad. & E. 102; 4 Ad. & E. 489; 1 C., M. & R. 254.)—*Eavestaff* v. *Russell*, 1 D. P. C. (N.S.) 950.

And see CHARTERPARTY; DETINUE; GAMING; HIGHWAY ACT; INSOLVENT, 3; PARTNERSHIP, 1; PATENT, 2; STATUTE.

PRACTICE.

1. (*Several rules to compute.*) In an action against several defendants on a bill of exchange, though separate judgments are signed against each, there cannot be separate rules to compute against each.—*Field* v. *Pooley*, 4 Scott, N. R. 524.

2. (*Service of notice of declaration.*) Notice of declaration was served by delivering it between six and seven o'clock in the evening of Saturday the 22d January, at the office of the plaintiff's attorney to the defendant's son, who promised to give it to his father. It did not appear at what hour the son reached home, but it was sworn that the defendant was from home till after nine o'clock, and that the notice was not given to him until the following morning. Judgment was signed for want of a plea on the 27th. The Court set aside the judgment.—*Fitch* v. *Kettle*, 4 Scott, N. R. 578.

3. (*Order of determination of issues in law and fact.*) Where there are issues both in fact and in law in an action, although the plaintiff has an option to try either first, that is subject to the discretion of the Court; and they will in general direct the issues in law to be determined first, since the cause may be decided thereby, and the trial become unnecessary; and also because after verdict there can be no amendment on the demurrer.—*Crucknell* v. *Trueman*, 9 M. & W. 684.

4. (*Informality in jury process, effect of.*) The Court refused, on motion, to set aside a verdict for the plaintiff, on the ground that no distringas juratores had been returned before the trial; although the objection had been taken before verdict. (1 Ad. & E. 772.)—*Gee* v. *Swann*, 9 M. & W. 685; 1 D. P. C. (N. S.) 896.

5. (*Non-issuable plea, how waived.*) Obtaining time to reply is a waiver of an objection that the plea is not an issuable one, the defendant having been under terms to plead issuably.—*Trott* v. *Smith*, 9 M. & W. 765.

6. (*Order to plead several matters.*) A defendant having obtained an order to plead several matters, pleaded a plea to the whole declaration, and delivered also a demurrer to one count, whereupon the plaintiff signed judgment as for want of a plea. The Court refused to set aside the judgment, except on the terms of the defendant's striking out the demurrer, and paying the costs occasioned by his defective pleading.—*Baily* v. *Baker*, 9 M. & W. 769; 1 D. P. C. (N. S.) 891.

7. (*On rule to rescind judge's order.*) An affidavit in support of a rule to rescind a judge's order need not take notice of a previous application for the same purpose made at chambers, and refused; unless it be necessary to do so in order to account for apparent delay in making the application to the Court. (7 M. & W. 142.)—*Thomas* v. *Evans*, 9 M. & W. 829.

8. (*Rejoining gratis, meaning of.*) The term "rejoining gratis," means rejoining

without a rule for that purpose; and therefore, where a defendant is under those terms, he has still four days from the delivery of the replication in which to rejoin; the only effect of that term being to dispense with the necessity of a rule to rejoin. —*Adkins* v. *Anderson*, 10 M. & W. 12; 1 D. P. C. (N. S.) 877.

9. (*Judgment as in case of nonsuit—Stet processus.*) In order to induce the Court, on a motion for judgment as in case of a nonsuit, to require a stet processus, the plaintiff need not swear in terms that he did not know of the defendant's insolvency at the time of the commencement of the action, provided his affidavit disclose circumstances showing that at that time the defendant's position presented an appearance of solvency.—*Bailey* v. *Elgie*, 1 D. P. C. (N. S.) 853.

10. (*Entering judgment nunc pro tunc.*) By the terms of a judge's order made by consent, the plaintiff was to be at liberty to sign judgment for debt and costs on a particular day, but before that day the defendant died: the Court would not allow the plaintiff to enter judgment nunc pro tunc, as of the day when the consent was given. (9 D.P.C. 337.)—*Wilkins* v. *Cauty*, 1 D.P.C. (N. S.) 855.

11. (*Service of rule to compute.*) Service of a rule to compute by putting it into the defendant's letter-box, his clerk afterwards stating that he had taken it out and given it to the defendant, held sufficient.—*Rayner* v. *Hodges*, 1 D. P. C. (N. S.) 863.

12. (*Delivery of particulars—Time to plead.*) A defendant obtained an order for further time to plead, on certain terms, but did not draw up the order, but on the same day took out an order for better particulars, with a stay of proceedings, and also a summons for further time to plead after the delivery of such particulars. On the following day the plaintiff's attorney delivered the particulars, and signed judgment as for want of a plea, the original time for pleading having then expired: Held, that the judgment was irregular.—*Daley* v. *Arnold*, 1 D. P. C. (N. S.) 938.

And see LUNATIC; PATENT, 1.

PRESCRIPTION.

In trespass for breaking and entering the plaintiff's closes, digging up and subverting the earth and soil, and sinking mines, pits, and shafts, and carrying and converting coals, culm, earth, soil, stones, ore, and other minerals, the defendants in certain pleas justified under a prescription in the name of King George the Third, in right of the Duchy of Lancaster, to enter upon the lands in question for the purpose of getting coals, iron-stone, ore, and other minerals, and to dig and open mines therein for that purpose, and to take and carry away the minerals, doing no more than was necessary for that purpose; the replication traversed the prescription, and issue was joined thereon. In other pleas the prescription was coupled with the following qualification or condition, viz., "making and paying to the tenant or occupier for the time being of such lands a reasonable compensation and satisfaction, when demanded, for the use thereof, and for all damage occasioned to the surface of the lands thereby." On the latter pleas the verdict was found for the defendants: Held, that the prescription was entire, and consequently did not sustain the pleas which omitted the qualification.—*Paddock* v. *Forrester*, 3 Scott, N. R. 715.

PRINCIPAL AND AGENT.

(*Agency, how constituted.*) On the 13th September, 1831, a bill of exchange in three parts was drawn on Messrs. B. & Co. at Calcutta, by J. S. at Birmingham,

and indorsed by the payee to the plaintiffs. They transmitted the set of bills to their bankers in London, who indorsed it to R., who indorsed it to the defendants. On the 30th September the defendants sent the first of the set of bills to A. & Co. at Calcutta, with a letter instructing A. & Co. "to do the needful and advise them thereof." In October the defendants forwarded the second and third of the set. A. & Co. received all three of the set, and on the 21st of April, 1832, presented the set of bills for acceptance, which was refused. It was duly protested for non-acceptance, and the defendants were advised by a letter, dated the 28th of April, of the dishonour. The protest was sent with the letter, but the bill was not returned. A duplicate of this letter was received by the defendants 3rd November, 1832, but the original, with the protest, was not received till the 18th April, 1833. On the day the defendants received the duplicate letter they gave notice of the dishonour to R., who gave notice to the plaintiffs.

A. & Co. at Calcutta, on the maturity of the bill, presented it to the drawer, and, payment having been refused, sent to the defendants a letter, dated the 27th July, expressing their regret that the defendants had given them no discretion in holding the bill, with a view of its being speedily paid by the drawee, and adverted to a letter that they had written to the drawee, regretting the necessity they were under of returning the bill, and at the same time observing that they would lose no time in remitting any sums he might think proper to pay them.

A. & Co. did not return the bill.

On the 31st July, 1832, A. & Co. wrote to the defendants, requesting instructions as to their mode of dealing with drafts on the same drawer, and stating, as to this bill, that they had retained it, with the original protest, in expectation of its being paid, and they forwarded the duplicate protest and the third bill of exchange. This letter inclosed a copy of a letter from the drawee, stating his expectation of speedy payment.

Both the letters of A. & Co., that of the 27th July and that of the 31st July, were sent to the defendants by the same ship, and were received by the defendants on the 10th December following, and on that day they presented the third bill of exchange and duplicate protest to R., who paid the amount with interest, exchange and re-exchange, and also received in due course the same from the plaintiffs.

On the 31st December, 1832, the defendants wrote to A. & Co. advising them of the receipt of the amount of the bill from R.

On the 12th September A. & Co. advised the defendants that they had received the amount from the drawer. This advice reached the defendants 30th January, 1833; they advised R. of it, disclaiming for themselves any interest in it, and the same day also wrote to A. & Co. at Calcutta, disclaiming all right to the money received by them from the drawer. A. & Co. became bankrupts on the 12th December, 1832.

Held, that A. & Co. were not the agents of the defendants in receiving the amount of the bill from the drawer.

Quære, whether, supposing the defendants to have received the amount of the bill twice, once themselves from the prior indorser, and once by their agent from the drawer, they were liable to the plaintiffs in an action for money had and received to their use.—*Rotton* v. *Inglis,* 2 G. & D. 257.

And see HUSBAND AND WIFE, 2.

PRISONER.

1. (*Discharge under* 48 *Geo.* 3, *c.* 123.) A prisoner is not entitled to relief under

48 Geo. 3, c. 123, s. 1, where the judgment under which he has been in custody exceeds 20*l.*, though it appear that the judgment would have been for a less sum, had the plaintiff given credit as he ought to have done for payments on account. —*Curtis* v. *Rickards*, 3 Scott, N. R. 646.

2. (*Discharge of defendant in execution, on plaintiff's death.*) A rule may be obtained absolute in the first instance for the discharge of a defendant in execution, on the plaintiff's death, upon the production of an affidavit by the next of kin that it is not his intention to prove any will or take out administration. (2 N. R. 240.)—*Gore* v. *Wright*, 1 D. P. C. (N. S.) 864.

PROCESS.

1. (*Successive writs of execution—Duration of ca. sa.*) Where, the venue being in Surrey, final judgment was signed on the 2nd of April, 1840, and a testatum ca. sa. of the same date issued into Yorkshire, on which the defendant was arrested; an original ca. sa. into Surrey, also dated the 2nd April, 1840, with a general return of non est inventus thereon, was held sufficient to warrant the testatum. (1 Ad. & E. (N. S.) 319.)

A writ of ca. sa. may be executed more than a year after its date. (5 M. & W. 631.)—*Greenshields* v. *Harris*, 9 M. & W. 774.

2. (*Duration of ca. sa.—Scire facias.*) A writ of ca. sa. may be issued on a judgment more than a year and a day old, without suing out a scire facias, if the defendant has even by parol agreed to waive the necessity of a scire facias, notwithstanding the statute of Westminster 2, 13 Edw. 1, st. 1, c. 45. (3 Ad. & E. 676.)—*Morgan* v. *Burgess*, 1 D. P. C. (N. S.) 850.

3. (*Distringas to outlawry.*) In order to obtain a distringas to proceed to outlawry, it is sufficient to show by a letter of the defendant that he is abroad to avoid his creditors.—*Round* v. *Brown*, 1 D. P. C. (N. S.) 860.

RAILWAY. See Reversioner.

RAILWAY ACT.

1. (*Construction of.*) In railway acts, the clause imposing tolls or duties, if there be any ambiguity therein, are to be construed most strongly against the company and in favour of the public.

By their act of incorporation, 1 & 2 Geo. 4, c. xliv. s. 62, the Stockton and Darlington Railway Company were empowered to demand, amongst others, the following tolls or duties for articles conveyed by their railways. "For all coals, &c. such sum as the company from time to time direct and appoint, not exceeding 4*d.* per ton per mile." "For all the articles, matters, and things for which a tonnage is hereinbefore directed to be paid, which shall pass the inclined planes upon the said railways, such sum as the company shall appoint, not exceeding 1*s.* per ton." "And for all coal which shall be shipped on board of any vessel or vessels in the port of Stockton-upon-Tees aforesaid (the only previous mention of the port being in sect. 1, where it is described as the port and town of Stockton-upon-Tees), for the purpose of exportation, not exceeding one half-penny per ton per mile.

Under the authority of a subsequent act, 9 Geo. 4, c. lxi. the Clarence Railway Company constructed a railway from a place on the river Tees called Port Clarence, communicating with the Stockton and Darlington Railway at a place called Sim Pasture.

Held, first, that the coal shipped for London was "coal shipped for the purpose

of exportation," within the meaning of the act, and therefore chargeable only with duty of one half-penny per ton per mile. Secondly, that coal shipped for exportation was liable to the inclined plane duty. Thirdly, that Port Clarence and a place called Middlesborough, both on the river Tees, were for this purpose within the port of Stockton-upon-Tees.—*Stockton and Darlington Railway Company* v. *Barret*, 3 Scott, N. R. 803.

2. *(Inquisition to assess damages under—Certificate of justices under.)* In an action for use and occupation, the defendants set up a defence that they had been lawfully evicted by the Manchester and Leeds Railway Company, under the provisions of the 6 & 7 Will. 4, c. cxi.

By sect. 138 it was enacted, that if any land-owner should not agree with the company as to the amount of the purchase money for his land, or should refuse to accept the purchase money offered, and give notice thereof within one month after the offer, or should refuse to treat after twenty-one days' notice to treat, or should not agree for the sale of his land, or should from absence or disability be incapable of agreeing, or should not disclose his title, or in any other case where an agreement could not be made, then the company should issue their warrant to the sheriff, commanding him to summon a jury to assess the purchase money for such land, and the sheriff was to give judgment for such purchase money, and the verdict and judgment were to be conclusive upon all persons, &c.: Provided that seven days' notice should be given by the company to such land-owner of the time and place of holding the inquisition.

By sect. 140, the verdict of the jury and the sheriff's judgment were to be kept as a record.

By sect. 5 the company might take land, although omitted from the usual parliamentary schedule of lands required by the company, if it should appear to two magistrates, in case of a dispute about the same, and be certified under their hands, that such omission proceeded from mistake.

A special verdict found that the premises in question of the plaintiff consisted of a house, and also a yard and garden occupied therewith, and included in the description of such house, and that two justices certified that the "house" had been omitted from the parliamentary schedule by mistake.

The verdict also stated that the company had given the plaintiff notice to treat, that he did not disclose his title or agree for the sale, that the company thereupon issued their warrant for assessing the amount of purchase money to be paid to him, and gave him due notice of the inquisition; that the inquisition was had before the sheriff, assessing such amount; that the sheriff had given judgment for the same, and that the company had paid it into the Bank of England to the plaintiff's credit.

The certificate of justices, the notices, the inquisition, and the warrant which was annexed to the inquisition, were set out.

The warrant contained no recital of any antecedent fact, but proceeded simply "We, &c. do by this our warrant, pursuant to the power given us by the said act, &c. command you the sheriff to summon a compensation jury, &c."

The inquisition in like manner contained no antecedent fact, but merely stated that the compensation jury had been returned in obedience to the warrant, and, after stating the purchase money awarded, concluded by stating that the sheriff gave judgment for the same pursuant to the act.

It was objected to the warrant and inquisition, that they did not upon the face of them state sufficient facts to show jurisdiction, because they did not state which

of the cases under sect. 138 had arisen, as to the non-agreement or otherwise, to justify the exercise of the company's compulsory power to take the plaintiff's land, or state the certificate of the justices.

There was also an objection to the inquisition separately, that it did not state the notice of inquisition.

Held, 1. That as the warrant was annexed to the inquisition, these were to be taken as one entire proceeding, and that any deficiency in either instrument might be supplied by reference to the other, and that, as it appeared from the warrant, that it had been issued, and from the inquisition that judgment had been given for the purchase money pursuant to the act, the proceedings themselves afforded the necessary intendment, that a previous agreement for the purchase money could not be made.

2. With regard to the omission to state in the certificate that the statement was unnecessary, as the effect of the certificate was simply to place the lands omitted from the parliamentary schedule on the same footing as if they had been inserted therein.

It was also objected to the certificate, that it did not state there had been any "dispute," so as to give jurisdiction to the certifying justices, and that it certified as to the "house" only, without mention of the yard and garden.

Held, 1. That the application to the certifying justices of itself showed there had been a dispute within the meaning of sect. 5.

2. That as the verdict found the yard and garden had been occupied with the house, as parcel thereof, they were included with the house in the certificate.—*Tayler* v. *Clemson*, 2 G. & D. 347.

RELEASE.

(*Construction of.*) To an action of covenant by a joint-stock banking co-partnership, on a guarantee given by the defendant to secure advances made by the company to M., M., and B., carrying on business under the name of M. & Co., the defendant pleaded, that by indenture between M., M., L., and B. of the first part, W., H., and O. of the second part, and the several persons or partnership firms who should execute the said indenture, being creditors of M., M., L., and B., of the third part, H., being a member of and partner in the said banking co-partnership, released M., M., L., and B. from all actions, debts, &c. In support of the plea, the defendant gave in evidence a composition deed, made between M., M., L., and B. of the first part, W., H., and O. of the second part, and the several persons or partnership firms, being creditors of M., M., L., and B., who should have executed or should execute the said deed, of the third part. The deed, after reciting that M., M., L., and B. were indebted to W., H., and O., and to the several parties to the deed of the third part, and being unable to pay the said debts, had conveyed all their property and effects to W., H., and O., in trust for payment of their debts, stated, that, in consideration thereof, each of the said creditors, parties to the deed of the second and third parts, did, for themselves, their heirs, executors, &c. and partners, release M., M., L., and B. from all actions, debts, demands, &c. At the date of this release, a separate debt of 2*l.* 15*s.* was due from M. to H.; and H. was a shareholder in the joint stock banking co-partnership. Held, that the plea was not proved, the release to M., M., L., and B., not including the debt due from M. & Co. to the joint stock banking company, but applying only to debts due to such partnership firms as should execute the deed of the third part.—*Bain* v. *Cooper*, 9 M. & W. 701.

REVERSIONER.

(*Action on the case by—Way-leave—Construction of exceptions in grant.*) Case by a reversioner against a railway company for entering and making a railway on his land.

Plea, that before the reversion of the plaintiff, the Dean and Chapter of Durham was seised in fee, and by indenture between them and the plaintiff demised to the plaintiff the lands in question for a term, "excepting and reserving the mines under the same, with a power to dig, win, and carry away the said mines, with free ingress, egress, and regress, way-leave and passage to and from the same, or to or from any other mines, lands, and grounds, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient passages, conveniences, privileges, and powers whatsoever, for the purposes aforesaid, and particularly of laying, making, and granting waggon ways in and over the last-mentioned premises or any part thereof." The defendants then justified making the railway as the servants of the dean and chapter, and by their authority.

Replication, (admitting the seisin in fee of the dean and chapter, and the demise to the plaintiff, and that he had no other title except under such demise,) de injuriâ, &c. Issue thereon.

On the trial it appeared that the railway company had made a double line of railway on the plaintiff's land, under a deed executed by the dean and chapter, and authorizing the company to make such a railway for the conveyance of passengers, goods, coals, wares, and merchandize. The railway was constructed for the purpose of conveying general goods and passengers as well as coals, but had not been actually so used, and the railway was not more than was necessary for the carriage of coals likely to be sent along it from the country with which it communicated.

The judge directed the jury that, if they thought the railway was made for other purposes as well as for the carriage of coals, the plaintiff was entitled to the verdict.

Held, 1. That if the railway was such a railway as the company, at the time when it was made, might lawfully make for the purposes for which, when made, they might lawfully use it, the plaintiff, as reversioner, had no ground of complaint by reason of the intention of the company also to use the railway for other purposes for which they had no right to use it, and that the direction of the judge was wrong.

2. That the proper construction of the excepting clause in the indenture of demise of the dean and chapter to the plaintiff was, that the clause gave the dean and chapter, not a general power of making ways, and granting way-leaves for all purposes, but for the limited purpose only of getting the excepted minerals. That the right possessed by the dean and chapter under the clause as lessors, was not the subject of an exception, as it was no parcel of the thing granted nor of a reservation, as it did not issue out of the thing granted, but that it was an easement newly created, by way of a grant from the lessee, and that it was to be taken that the lease was executed by the lessee, although it was not stated to be so. That the proper question for the jury was, not whether the railway was made for other purposes as well as for the carriage of coals and minerals, but whether at the time when the road was made it had become necessary or expedient for the company to make a road for the purpose of getting the excepted minerals, and if so, whether the road actually made was a proper road for that purpose,

assuming it would be used for no other purpose. (2 Ad. & E. 705; 7 M. & W. 63.)—*Durham and Sunderland Railway Company* v. *Walker*, 2 G. & D. 326.

SEQUESTRATOR. See BENEFICE, 2.

SETTLEMENT.

(*By estate—Derivative settlement of emancipated child, not within* 4 & 5 *Will.* 4, *c.* 76, *s.* 68.) The derivative settlement of a child, whose father has acquired a settlement by virtue of the possession of an estate or interest in a parish, is not itself a settlement by virtue of such possession within 4 & 5 Will. 4, c. 76, s. 68. Where therefore the father and his emancipated child, removed more than ten miles from the parish, in which the father had gained a settlement by possession of an estate and interest: Held, that the child did not lose his settlement by the above section.

Per Coleridge, J., the child, if unemancipated, would have lost his settlement by the operation, not of the above section, but of the general law of settlement. —*Reg.* v. *Inhabitants of Hendon*, 2 G. & D. 394.

SEWERS' RATE. See PALACE.

SHIP.

(*Property in, when it passes from builder to purchaser.*) A rudder having been made for a ship, and intended by the builder to form part of it when completed, it was held, that a jury were warranted in finding that the property in it passed with the ship, although not completely finished so as to be attached to the ship at the time she was taken away.

It is no objection, under the stat. 3 & 4 Will. 4, c. 55, ss. 15, 25, to a contract for the sale of a ship in the course of building, that it contemplates the delivery by the builder to the purchaser of a certificate, to enable the latter to procure a registry as owner before the ship is completed.—*Goss* v. *Quinton*, 4 Scott, N. R. 471.

STAMP. See BANKRUPTCY, 1.

STATUTE.

(*Act done in pursuance of, what is—Tender of amends—Pleading.*) By a local act (6 Geo. 4, c. lxx), certain commissioners were empowered to cause any "present or future sewers, ditches, drains, &c. to be opened, enlarged, altered, or cleansed:" and it was enacted, that in case any action should be brought against any person for any thing done in pursuance of the act, or in relation to the matters therein contained, the plaintiff should not recover in any such action, if tender of amends should have been made to him, &c. or his attorney, by or on behalf of the defendant, &c. before such action brought; and in case no such tender should be made, that it should be lawful for the defendant, by leave of the Court, to pay money into Court; and if the matter should appear to have been done in pursuance and under the authority of the act, or after sufficient satisfaction made or tendered as aforesaid, then that the jury should find for the defendant.

The commissioners, of whom the defendant was one, appointed a committee to inspect a certain ditch, with a view to widening the same, and to report thereon. The committee having reported thereon in favour of widening the ditch, the commissioners appointed a second committee, of whom the defendant was one, to confer with a surveyor respecting the work, with power to two of

them to act. The defendant being afterwards told by the clerk to the commissioners that he might proceed without further instructions from the commissioners, took the plaintiff's land for the purpose of widening the drain, without having given him notice or obtained his consent. The land was taken for the bonâ fide purpose of widening the drain. The defendant, before action, tendered 10*l.* as amends, which the plaintiff refused to accept; but no tender was pleaded, nor was the amount paid into Court. The jury found the trespass, and that the damage amounted to 5*l.*: Held, first, that although neither the defendant nor the commissioners were authorised to take plaintiff's land without his consent in writing, yet the defendant was entitled to the protection of the act.

Secondly, that the defendant was not bound to plead the tender, or pay the amount tendered into Court.—*Jones* v. *Gooday*, 9 M. & W. 736; 1 D. P. C. (N. S.), 914.

TENDER OF AMENDS. See STATUTE.

TITHES.

(*Issue under* 6 & 7 *Will.* 4, *c.* 71, *s.* 46—*New Trial—Misdirection.*) The tithable lands in the parish of Tenterden consisted of different descriptions, viz., uplands, townlands and marshlands; the occupiers insisted upon an immemorial modus or customary payment of 4*d.* an acre in lieu of vicarial tithes in respect of the uplands, of 6*d.* an acre in respect of the townlands, and 8*d.* an acre in respect of the marshlands. An award made by an assistant tithe commissioner under 6 & 7 Will. 4, c. 71, found the alleged modus as to the marshlands, but disaffirmed it as to the uplands and townlands, there being no certain or defined boundary-line separating the uplands from the townlands. An issue was thereupon directed under section 46, wherein the question was, "whether from time whereof, &c., there had been and was within the parish a certain known portion of the said parish consisting of lands called uplands, and whether from time whereof, &c. there was not paid and payable by the occupiers of the district a modus or customary payment of 4*d.* for every acre of such lands occupied by such occupiers;" and a similar issue (in another cause) as to the townlands, the modus as to the marshlands not being disputed.

At the trial it appeared there was a natural boundary between the marshlands and the rest of the parish, and with respect to the uplands and townlands, the plaintiff proved that there were lands in the parish which had been immemorially known as such, and had always paid the averages of 4*d.* and 6*d.* respectively, and that the lands occupied by him were within the district or division known as uplands, but he failed to establish a precise boundary line separating the townlands from the uplands; whereupon the judge told the jury, that in the absence of proof of a defined boundary between the uplands and townlands, there was no evidence to show that there was a certain known portion of the parish consisting of lands called uplands: Held, that this was not a proper direction.—*Shoobridge* v. *Ward*, 4 Scott, N. R. 579.

TRESPASS.

(*Trespass or case.*) The defendant and others hired a job carriage and four post-horses, with two postilions, to go to Epsom Races. On the road, the drivers, in cutting into the line formed for the purpose of passing through a toll-gate, overturned a gig in which the plaintiff was and severely injured him. After the

accident, the defendant, who was on the driving-box, offered money to the plaintiff, and gave him his card; and on the owner of the gig afterwards calling upon him, the defendant said that "cutting in was all fair on such occasions, and he intended, if the gig had gone quietly out, to have pulled up to let it in again:" Held, that the jury were warranted in inferring that the postilions acted as they did with the defendant's sanction, and consequently that he was liable in *trespass* for the injury done.—*M'Laughlin* v. *Pryor*, 4 Scott, N. R. 655.

TROVER.

(*When maintainable by factor.*) C., a manufacturer at Newcastle, consigned goods to E. & Co., his factors in London, specifically to meet a bill drawn upon them, transmitting to them a receipt, signed by the mate of the vessel, acknowledging the goods to have been received on board to be delivered to E. & Co.: Held, that E. & Co. had a sufficient property in the goods to entitle them to maintain trover against a wrongdoer, the consignor not having repudiated the contract upon which they were sent. (5 M. & Sel. 350; 1 Bos. & P. 563; 3 M. & W. 15; 4 M. & W. 775.)—*Evans* v. *Nichol*, 4 Scott, N. R. 43.

WARRANT OF ATTORNEY.

1. (*Judgment on old warrant of attorney.*) In applying for leave to sign judgment on an old warrant of attorney, it is not sufficient to show by the *hearsay* statement of a deponent, that the defendant was recently alive.—*Key* v. *Montague*, 1 D. P. C. (N. S.), 858.

2. Where a warrant of attorney was given, the language of which did not clearly show the term of which judgment was to be signed, but the defendant agreed that it should be signed soon after the date, and it was accordingly so signed, and a sci. fa. to revive the judgment was subsequently served on the defendant, and eleven years elapsed between the date of the judgment and of the execution: the Court refused to set aside the judgment and execution, even at the instance of the assignees of the defendant, who had become bankrupt.—*Farnell* v. *Adams*, 1 D. P. C. (N. S.), 869.

WARRANTY. See Contract of Sale.

WAY-LEAVE. See Reversioner.

WEIGHTS AND MEASURES ACT.

(*Authority of inspector.*) An inspector of weights and measures, appointed by the sessions under the 5 & 6 Will. 4, c. 63, s. 17, and having a general warrant from a magistrate, under s. 28, to act as such within his jurisdiction, may, by virtue of such appointment and warrant, enter any shop, &c. within his district, at all seasonable times, to examine and seize false weights and measures, and need not have a special warrant from a justice in each individual case.—*Hutchings* v. *Reeves*, 9 M. & W. 747.

And see Navigation Act.

WITNESS.

1. (*Attachment against for disobeying subpœna—Form of subpœna.*) A subpœna requiring the party to attend the trial of a cause on the commission day of the assizes, extends to the whole assizes, and it need not go on to require his attendance "from day to day until the cause is tried."

Semble, it is not sufficient, in answer to an application for an attachment against a witness for disobedience to a subpœna, to show that his evidence was not material.

In answer to a motion for an attachment, the witness swore, that he had been for some time in bad health; that on the day before the trial came on, he had been in readiness to attend and give evidence; that on the morning of the trial he was unwell, and did not rise until ten o'clock, and that on going shortly afterwards to his office, which was in his way to the Court, he found the cause had been tried. The Court discharged the rule.—*Scholes* v. *Hilton*, 10 M. & W. 15.

EQUITY.

[Containing Cases in 3 Beavan, Part 3; 4 Beavan, Part 1; 11 Simons, Part 2; and 1 Hare, Parts 3 and 4.]

ACCIDENT. See Costs, 3.

ACCOUNT.

1. (*Correcting examination.*) In a suit for taking accounts of a partnership, a defendant omitted, wilfully as the Court thought, to insert in his examination any receipts or payments by him during part of the time that the partnership subsisted. The plaintiff afterwards proved receipts by him during such time. The Court refused to allow the defendant's representatives to give evidence of payments made during the period omitted.—*Maddeford* v. *Austwick*, S. 209.

2. (*Plea of accord and satisfaction.*) *Semble*, that there is no rule that a release or a stated account are the only defences which can be set up by way of plea to a bill for an account, and that accord and satisfaction may be a good plea. —*Brown* v. *Perkins*, H. 561.

ADMINISTRATION OF ASSETS.

1. (*Concurrent suits—Costs.*) Pending a litigation in the Ecclesiastical Court as to the validity of a will, a creditor filed a bill for a receiver. The alleged will being held invalid, an administrator was appointed; whereupon another creditor filed a cross suit, and rapidly obtained a decree. The plaintiff in the first suit was declared entitled to his costs out of the estate.—*Froud* v. *Baker*, 4 B. 76.

2. (*Equitable mortgagee.*) An equitable mortgagee being plaintiff in a creditor's suit, in which his security was sold, was held entitled to recover the proceeds in payment of his debt, but his costs, including those of the purchaser, which he was ordered to pay in the first instance, were thrown upon the general estate, and were postponed to those of the executor.—*Tipping* v. *Power*, H. 405.

3. (*Exoneration of personalty—Legacies.*) Where there was a devise of real estate in trust to sell and apply the proceeds in payment of debts and legacies, and such estate proved insufficient for the purpose: Held, that the legacies, as well as the debts, were payable out of the personalty.—*Colvile* v. *Middleton*, 3 B. 570.

4. (*Parties—Debtor of testator.*) Case, in which a creditor of a testatrix was allowed to sue the executors and persons claiming a fund standing in Court, on which the estate of the testatrix had an equitable demand, for the purpose of obtaining payment thereout, the executors having refused to take proceedings for establishing the demand.—*Lancaster* v. *Evors*, 4 B. 153.

5. (*Proof of plaintiff's debt.*) In a creditor's suit, seeking to charge the real and personal estate of the testator, where the debt of the plaintiff was admitted by the executors and trustees, and by such of the parties beneficially entitled as

were *sui juris*, but one defendant was a married woman, and another an infant. A decree for account was made without evidence of the debt, liberty being given to plaintiff to prove it before the master. Two of the defendants were alleged, and in like manner admitted, to be out of the jurisdiction; but the fact was not proved; liberty was given, under the decree, to exhibit interrogatories for that purpose.—*Hughes* v. *Eades*, H. 486.

6. (*Retainer by executor.*) The right of retainer of an executor is not lost by payment into Court, and takes precedence of the costs of suit.—*Tipping* v. *Power*, H. 405.

ADMINISTRATION SUIT.

(*Parties—Where will proved in India.*) To a suit in respect of an unadministered part of a testator's estate, which was in the hands of an executor who was in India at the time of the testator's death, and had proved the will there, but had since returned to England, a personal representative constituted in England, by probate of the will here, held a necessary party.—*Bond* v. *Graham*, H. 482.

AGREEMENT.

1. (*Construction—Provision on marriage.*) A parent, in the written proposals on the marriage of his daughter, stated, "He intended to leave his daughter a further sum of 10,000*l.* in his will, to be settled on her and her children, the disposition of which, supposing she had no children, to be prescribed by the will of her father." He died without leaving that sum: Held, that there was an obligation on the parent, to be satisfied out of his assets.—*De Beil* v. *Thomson*, 3 B. 469.

2. (*Construction—Retiring partner.*) To bill filed by the executors of a deceased partner for an account against surviving partner, the latter pleaded an agreement not in writing, whereby for a certain and definite consideration (which was stated in the plea), all claims of the testator in respect of the estate, money, and effects of the copartnership, and the debts due to and from the same, were agreed to be waived: Held, that the agreement should be construed to import that the defendant thereby took upon himself the discharge of the partnership liabilities, and that the plea was bad on the ground that it did not aver that there were no liabilities remaining undischarged.—*Brown* v. *Perkins*, H. 564.

3. (*Execution by agent—Statute of frauds.*) A parent, by his agent, on the marriage of his daughter, entered into an engagement, in writing, with her intended husband, in which his name was written, but not signed: Held, that a letter written by the parent after the marriage, referring to the memorandum, as stating the terms of the engagement, was either a sufficient agreement signed by the party, within the statute of frauds, or a sufficient recognition of the use made of his name in the memorandum.—*De Beil* v. *Thomson*, 3 B. 469.

4. (*Statute of frauds—Proposal before master.*) A proposal for a settlement contained in a state of facts, carried in before the master, and supported by the affidavit of the intended husband, and approved by master, is a contract within the statute of frauds.—*Cook* v. *Fryer*, H. 498.

ANNUITY.

(*Perpetual annuity—Real or personal.*) A perpetual annuity was granted by King Charles the Second to A. and his heirs, payable out of the coal duties: Held, that though descendible to the heirs, it was personal and not real estate.—*Radburn* v. *Jervis*, 3 B. 450.

ASSIGNMENT.

(*Ship and future cargo,*) An assignment by way of mortgage of a ship at sea, *with all the oil, head matter, and other cargo which might be brought home,* was made and entered on the registry of ships of the port to which the ship belonged, and notice thereof sent to the master of the ship, and the ship was delivered up to the mortgagee on its return to port: Held, that the equitable title of the mortgagee to the ship and cargo was perfected, and could not be defeated by a judgment creditor who had brought his action after the possession of the ship was taken by the mortgagee, and recovered judgment therein, and taken the ship in execution.

Semble, that property not existing at the time of the assignment is assignable in equity.—*Langston* v. *Horton*, H. 549.

BREACH OF TRUST.

1. (*Compliance with improper direction in will.*) Bequest of consols to A. B., a feme covert, to be transferred to her in her own name, and the interest to be for her separate use, and the principal to remain in trust of the executors till the youngest of her children attained twenty-one, when the principal was to be her own; or in case of her demise, it was to devolve to her husband. The trustees, on the death of the testatrix, transferred the fund to A. B.; she and her husband afterwards sold it out, and they both signed the transfer: Held, that a breach of trust had been committed, but that A. B. had made a valid disposition of the dividends which might accrue previous to her youngest child, born after the death of the testatrix, attaining twenty-one.—*Crosby* v. *Church*, 3 B. 485.

2. (*Payment of money into Court.*) Defendant being trustee under a will, containing no direction as to investment, lent part of the trust fund upon the security of unsurrendered copyholds, the deposit of a lease, and a bond. He was ordered to bring the money into Court within six weeks.—*Wyatt* v. *Sharratt*, 3 B. 498.

3. (*Third party—Solicitor—Costs.*) A party advising a loan unauthorized by the trust, for the purpose of deriving a benefit from it, as by obtaining payment out of the money lent of a debt due to him by the borrower, is liable for any loss consequent on the breach of trust. But where the solicitors who were concerned for the borrower, acted also usually, and to some extent in this case, as the solicitors of the trustee, but another solicitor, who was called in on behalf of the trustee, and one of the cestui que trusts, assented to the loan, and the loss did not take place upon the original security, which was ample in point of value, but upon a security substituted for it, in pursuance of a provision in the original mortgage deed, and it was not proved, though it was alleged, that the solicitors had applied part of the money lent in payment of a debt due to them by the borrower: the bill of the cestui que trusts was dismissed as against the solicitors, but without costs.—*Fyler* v. *Fyler*, 3 B. 550.

4. (*Where no trustees.*) A father, on the marriage of his daughter, agreed to pay, by way of portion, a sum of money to trustees to be held in trust for the husband, daughter, and children of the marriage in succession. The trustees named in the settlement having refused to act, the father paid the money to the husband: Held, that the payment was wrongful; and the money having been lost, the father was held liable, at the suit of a child of the marriage, to pay it a second time.—*Evans* v. *John*, 4 B. 35.

CHARGE.

1. (*Extinguishment.*) An estate subject in conjunction with another estate to a charge of 10,000*l.*, is afterwards mortgaged, and is then devised to the party entitled to the first charge. By agreement made with the owner of the other estate, a certain portion of the 10,000*l.* was thrown upon that estate, and it was agreed "that the remainder of the estate subject to the charge should be exonerated from the residue of the sum:" Held, that this charge could not be set up as to such residue against the mortgagee.—*Farrow* v. *Rees*, 4 B. 18.

2. (*Presumption of merger—Transfer to trustee.*) The transfer to a trustee of a charge paid off is not conclusive evidence of an intention to keep it alive. Accordingly, where A. B., the owner in fee of an estate, paid off a mortgage in fee existing on it, which in 1807 was transferred to a trustee, in trust for A. B., her "heirs, executors, administrators, and assigns respectively," and the trustee covenanted to convey to A. B., her heirs or assigns, or unto such other person or persons, and in such manner and form as A. B., her heirs, executors, administrators, or assigns should direct. A. B. devised the estate to a trustee to pay certain specified legacies, and subject thereto, she devised it to C. D. in fee, "and upon or for no other use, trust, intent, or purpose whatsoever." A. B. died in 1832: Held, that the mortgage had merged.—*Hood* v. *Phillips*, 3 B. 513.

CHARITY.

1. (*Costs of trustees.*) A trustee of a charity made to pay the costs of an information to correct a misapplication of the funds, which had been going on for many years, and which the company had persisted in ignorantly; but the misapplication was for their own benefit, and they claimed in the suit to continue it.—*Attorney-General* v. *Drapers' Company*, 4 B. 67.

2. (*Same point.*) Same point decided same way.—*Attorney-General* v. *Christ's Hospital*, 4 B. 73.

3. (*Increased value.*) A. B. bequeathed to a company a sum to purchase lands of the clear value of 100*l.* a year, and gave 96*l.* to charity, and "the residue of the said sum of 100*l.*, being 4*l.* yearly, to the company for their pains:" Held, that all the objects were entitled rateably to the increased rents.—*Attorney General* v. *Drapers' Company*, 4 B. 67.

4. (*Same.*) A testatrix, after reciting that the rent of a property was 10*l.*, devised it to *Christ's Hospital, a charitable foundation*, in trust as to 6*l.* for the poor of three parishes, and as to 4*l.*, to A. B. for life, and after her death, in trust for the three parishes: Held, that Christ's Hospital took no interest in the increased rents.—*Attorney General* v. *Christ's Hospital*, 4 B. 73.

5. (*Sale of charity estates.*) It is by no means a matter of course for the Court to direct an inquiry as to whether the sale of an estate would be beneficial to the charity to which it belongs, and where an estate belonging to a charity had been included by mistake in a decree for sale made in another charity suit, and the mistake having been discovered, a new information was filed, to set aside the sale, and containing other matter supplemental as to the charity, the proper object of the suit, but which also prayed for an inquiry, whether it would be beneficial to the other charity to resell the estate; all the latter part of the information was dismissed.—*Attorney General* v. *The Corporation of Newark*, H. 395.

CONSTRUCTION OF STATUTES. See PRACTICE, 27.

CONTEMPT.

(*Discharge.*) Where, under the 1 Will. IV. c. 36, a defendant in custody becomes entitled to his discharge, he cannot waive that right by acquiescence or subsequent proceedings.—*Haynes* v. *Ball*, 4 B. 101.

COPYHOLD.

(*Partition.*) A bill in equity does not lie for a partition of copyholds.—*Horncastle* v. *Charlesworth*, S. 315.

CORPORATION.

1. (*Members made parties—Bill of discovery—Injunction.*) The rule that officers of a corporation may be made co-defendants to a bill against that corporation, applies to a bill for discovery as well as to a bill for relief, and members of the corporation, as well as its officers, may be made defendants. But where the common injunction has been obtained against the corporation upon a bill so framed, it will be dissolved upon the coming in of the answer of the corporation, without waiting for that of the other defendants.—*Glascott* v. *The Copper Miners' Company*, S. 305.

2. (*Suit against—Examination of members.*) *Quære*, in a suit against a corporation, can an individual member of it be examined as a witness, or only as a party, by leave of the Court.—*Holmes* v. *Mayor of Arundel*, 4 B. 155.

COSTS.

1. (*Adoption of unauthorized suit.*) A party in a cause, although made a party without his authority, cannot take the benefit of the suit, without bearing the reasonable expenses of it.—*Hall* v. *Laver*, H. 571.

2. (*Disclaimer.*) Devisees having disclaimed by answer in a creditor's suit, the plaintiff nevertheless brought the suit to a hearing against them: Held, that he was entitled to do so, and that the costs of the devisees were to be paid, not by him but out of the estate, according to their priority.—*Tipping* v. *Power*, H. 405.

3. (*New copies of papers in the cause.*) The papers in the suit were accidentally burnt in the offices of the relator's solicitor, and new office copies became necessary for the hearing of the cause. A decree was afterwards pronounced against the defendant, with costs as between party and party: Held, that the extra costs occasioned by the accident ought not to be borne by the defendant. —*Attorney General* v. *Kerr*, 3 B. 495.

4. (*Trustee of fraudulent deed.*) Where a deed was set aside, as being voluntary and in contemplation of insolvency, no costs were given to or against the trustee of such deed.—*Townsend* v. *Westacott*, 4 B. 59.

And see ADMINISTRATION OF ASSETS, 2; PRACTICE, 9, 10, 11, 15, 17; TRUSTEE.

CUSTOM.

(*Lord of the manor—Damage by mining.*) Quære whether a custom for a lord of a manor to carry on mining operations so as to injure the houses of the copyholders, without making compensation, is valid. The Court would not decide it on a motion from copyholder for an injunction, but refused the injunction, leaving the copyholder to his legal remedy.—*Hilton* v. *Lord Granville*, 4 B. 130.

DISCOVERY.

1. (*Evidence for defence.*) Semble, that a bill of discovery may be filed against plaintiff at law for the discovery of evidence which will rebut the evidence for the case of plaintiff at law, and that such bill is not to be considered as a bill to make the plaintiffs admit they have no case.—*Glascott* v. *The Copper Miners' Company*, S. 305.

2. (*In aid of appeals in Privy Council.*) Although the Privy Council has power to order fresh evidence to be brought before it on appeal, the Court will not, until such order has been made, entertain a bill of discovery to obtain such evidence. Nor will it do so even then as a matter of course.—*Wood* v. *Hitchings*, 3 B. 504.

3. (*Parties—Mortgagee.*) A bill of discovery being filed against the mortgagee in possession of a leasehold, in aid of an action brought against him on one of the covenants in the lease, a plea that the mortgagor ought to be made a party was overruled.—*Balls* v. *Margrave*, 3 B. 448.

N.B.—Order for production.—*S. C.* 4 B. 119.

DOWER.

1. (*Election—Estate in common.*) A tenant in common, having agreed to make partition, devised the estate upon trust to convey the part agreed according to the agreement, and to receive a conveyance of the other part; and he devised that and the rest of his estate upon trust, among other things, to pay an annuity to his widow: Held, that she was bound to elect; that she had not under the circumstances elected by receiving the annuity and releasing from dower the part conveyed under the will; and that her right to dower attached to the whole of the moiety taken on the partition.—*Reynard* v. *Spence*, 4 B. 103.

2. (*Equitable interest in moiety, with legal estate in whole.*) The legal estate of a property being vested in A. for the benefit of himself and B. in equal moieties, he mortgaged it unknown to B. B. afterwards paid off the mortgage, and had the legal estate conveyed to him, subject to such equity of redemption as the lands were subject to: Held, that there was not such a perfect union of the legal and equitable estate in B.'s moiety of the estate as to give his widow a title to dower.—*Knight* v. *Frampton*, 4 B. 10.

DRAINING ACT.

(*Practice—Infant—Expenses paid out of fund.*) Under the draining act, where the tenant for life is an infant, the petition must be presented in the name of his guardian. Form of reference under this act (3 & 4 Vict. c. 55), and of the subsequent proceedings thereon. Amount of the expenses of draining ordered to be paid out of a fund to which the infant tenant for life was absolutely entitled, in lieu of charging the lands.—*Stanhope* v. *Stanhope*, 3 B. 547.

EVIDENCE.

1. (*Affidavit of party.*) The affidavit of a party that he had lost a book which a purchaser under the decree was entitled to have delivered to him, held not conclusive, but that the purchaser was entitled to inquiry.—*Stubbs* v. *Sargon*, 4 B. 9 0

2. (*Examination—Difference between examination and commission.*) On the examination of witnesses before the examiner, new interrogatories may be from time to time exhibited for the examination of the same or other witnesses; but secus, in an examination before commissioners, except by leave of the Court. —*King of Hanover* v. *Wheatley*, 4 B. 78.

3. (*Form of interrogatory.*) An interrogatory asking witness whether it was agreed to the effect suggested in the interrogatory is not leading.—*Lincoln* v. *Wright*, 4 B. 166.

4. (*Re-examination by plaintiff and defendant.*) New commission granted to cross-examine plaintiff's witnesses abroad, upon subsequent discovery of matter material for such examination; but held, that the plaintiff could only be allowed to re-examine on a special case being made, and then only as to matters not comprised in the former interrogatories.—*King of Hanover* v. *Wheatley*, 4 B. 78.

And see ADMINISTRATION OF ASSETS, 5; PRACTICE, 6, 18.

FOREIGN LAW.

(*Reference as to.*) A master's report upon a point of Scotch law, founded on an opinion of Scotch advocates, adopted and acted on.—*Williams* v. *Williams*, 3 B. 547.

FRAME OF SUIT.

(*Discovery and relief.*) A plaintiff cannot by the same bill obtain specific relief and discovery as to matters irrelevant to such relief. Accordingly, where a bill was filed for a receiver pending a litigation in the Ecclesiastical Court respecting two wills, it was held, that discovery could not be obtained by the same bill as to the alleged fraud in connection with one of the wills.—*Wood* v. *Hitchings*, 3 B. 504.

HUSBAND AND WIFE.

1. (*Fraud on marital right.*) A settlement made by a woman without the knowledge of her intended husband pending a treaty for a marriage, held good on the ground that the husband, by his co-habitation with her previously to the marriage, had rendered retirement from the marriage on her part impossible.—*Taylor* v. *Pugh*, H. 608.

2. (*Misjoinder.*) After decree in a suit by husband and wife jointly, to recover property which was settled to the wife's separate use, the court refused to entertain the objection of misjoinder, taken on petition of wife (by a next friend), by a respondent who was not an accounting party.—*Warren* v. *Buck*, 4 B. 95.

3. (*Withdrawal of wife from suit brought in her name when infant.*) Such an application being made by wife when she had been made co-plaintiff in a suit against her husband, the application being made immediately on her coming of age, the court refused to make the order without first examining the wife in the absence of her husband.—*Cooke* v. *Fryer*, 4 B. 13.

And see MARRIAGE; SETTLEMENT, 5.

INFANT.

(*Stat. 2 & 3 Vict. c. 54.—Access of mother to children.*) The Vice-Chancellor of England has jurisdiction under the act of 2 & 3 Vict. c. 54.

The Court will not make an order under this act, to give the mother access to her children, pending a suit by the wife in the Ecclesiastical Court for restitution of conjugal rights.

Semble, that where the husband is *bonâ fide* resident abroad, as the Court cannot make an order under this act which could be enforced, it will not interfere.

Semble, also that where the wife has left the husband without just cause, the Court will not interfere.—*In re Taylor*, S. 178.

And see MORTGAGE, 4.

INJUNCTION.

1. (*Exparte—suppression of facts.*) Where a plaintiff, upon an application for an *exparte* injunction, suppresses material facts, the injunction will be dissolved on that ground alone; and the plaintiff will not be allowed, on a motion to dissolve, to maintain it on the merits then disclosed.—*Hilton* v. *Lord Granville*, 4 B. 130.

2. (*Title under irregular execution.*) The plaintiff in equity had obtained possession of a leasehold by purchase under an execution, but without obtaining any assignment from the sheriff, which he ought to have done. The defendant then brought ejectment at law, but was restrained from proceeding in the action by an injunction granted on his answer coming in; from which it appeared that the ground of his action at law was the want of actual assignment, though he also sued on equitable circumstances, which the Court held raised no objection to the injunction, as being for the consideration of equity alone.—*Jones* v. *Hughes*, H. 383.

And see PRACTICE, 33.

INSOLVENT.

(*Insolvency and bankruptcy.*) A fiat in bankruptcy does not supersede an assignment under the Insolvent Act (7 Geo. 4, c. 47), though the fiat be founded on an act of bankruptcy prior to the insolvent's discharge.—*Sidebotham* v. *Barrington*, 3 B. 524. See *S. C.* 4 B. 110, where this decision is followed up.

INTERPLEADER.

1. (*Amount of sum in dispute.*) The Court will entertain a bill of interpleader, though the value of the subject in dispute is under £10. In this case the bill was supplemental.—*Crawford* v. *Fisher*, H. 436.

2. (*Costs.*) The plaintiff, in interpleader, must bear the costs of any proceedings which he may take in the suit that are productive of needless expense; and, therefore, where the plaintiff filed affidavits, verifying the statements of the bill, and entered into evidence in the cause, and obtained a second injunction ex parte to restrain proceedings at law, when no such proceedings were threatened, he was ordered to pay the costs thereby incurred.—*S. C.*

3. (*General principles.*) Observations on the circumstances which render cases properly, or not properly, the subjects of interpleader.—*S. C.*

4. (*Jurisdiction of Common Law Courts.*) The Interpleader Act, 1 & 2 Will. 4, c. 58, and 1 & 2 Vict. c. 45, giving jurisdiction to the Common Law Courts to make parties interplead, applies only to cases where the claims of both parties are strictly legal, and where such an order had been granted by a common law judge, in a case where one of the claimants had an equitable demand, as mortgagee, an injunction was granted at his suit to restrain proceedings under the order of interpleader, and for equitable relief.—*Langton* v. *Horton*, 3 B. 464.

5. (*Subject or suit.*) *Semble*, a suit of interpleader ought to be so constituted at the hearing, that the decree may embrace the whole property, which is the subject of the claims of the defendants, whereupon the Court is required to adjudicate.—*Crawford* v. *Fisher*, H. 436.

6. (*Tenant attorning in ignorance.*) Upon the death of a landlord, the tenant, in ignorance of the rights of parties, attorned and paid rent to A., who claimed as devisee. The right of A. to the property was afterwards disputed by B., the

heir. Held, that the tenant might maintain a bill of interpleader against A and B.—*Jew* v. *Wood*, 3 B. 579.

INJUNCTION. See CORPORATION, 1; PRACTICE, 5; SALE UNDER DECREE.

JOINT STOCK COMPANY.

(*Script.*) The purchaser of "Script certificates" in a proposed railway company which had not obtained any act of parliament, held, after the act had passed, and in the absence of any special contract, not bound to take a transfer of the corresponding shares from his vendor, or to indemnify him from the amount of calls subsequently made.—*Jackson* v. *Cocker*, 4 B. 59.

JURISDICTION.

1. (*Bankrupt's estate—staying dividend.*) Plaintiffs in equity claiming to be admitted as creditors under a fiat in bankruptcy, in respect of a breach of trust by the bankrupt, which was the subject of the suit in equity, applied, on a dividend of the bankrupt's estate being about to be declared, to be allowed to enter a claim upon the proceedings, and to have a fund reserved: the application being refused by the commissioners, was renewed by petition to the Court of Review, when that Court made no order, but thought that the assignees should not pay any dividend until the petitioners had had an opportunity of applying to this Court. They accordingly filed a supplemental bill, praying an injunction to restrain the assignees from paying any dividend which might be declared, until the cause in equity was heard, or without reserving a sufficient fund to answer the plaintiff's demand. Held, that *if* the Court of Chancery had jurisdiction to interfere in the distribution of the estate of a bankrupt, the Court ought not to exercise that jurisdiction upon any question that had been adjudicated on by the Court of Review, a Court at any rate of concurrent if not exclusive jurisdiction. And, *semble*, the Court has not any jurisdiction to interfere in the mere distribution of the estate of a bankrupt, either on the ground of trust or otherwise.—*Thompson* v. *Derham*, H. 358.

2. (*Commissioners of sewers—excess of powers.*) Where commissioners of sewers, under an act of parliament, are proceeding to pave and make sewers to the injury of property, in a case not within the act, this Court, unless expressly excluded, has jurisdiction to interfere, although, by the act, jurisdiction is given to the justices at sessions, whose judgment is not to be removed by *certiorari* or otherwise into any of her Majesty's courts of record at Westminster or elsewhere.—*Birley* v. *Constables of Charlton*, 3 B. 499.

3. (*Inferior branches of Court.*) The Vice Chancellors cannot discharge an order of the Lord Chancellor to set down exceptions for argument without the authority of the Lord Chancellor to entertain the motion.—*Earl of Glengall* v. *Bland*, H. 624.

4. (*Proceedings in the Admiralty Court.*) The Court has jurisdiction to restrain proceedings on a bottomry bond in the Admiralty Court, with the view of administering justice in a more convenient form; and it granted an injunction on that ground in a case where the proceedings in the Admiralty Court, in that particular form, were not framed in the most effectual manner to the attainment of their purpose, and where the questions, particularly one of apportionment, were such as could be better tried in equity.—*Duncan* v. *M'Calmont*, 3 B. 409.

And see COPYHOLD; INFANT; PRACTICE, 4, 19, 27; TAXATION OF COSTS, 1.

LEGACY.

(*Payment.*) Where a vested legacy is directed to accumulate or the payment is postponed for the benefit of the legatee, he may, if he have an absolute interest in the legacy, have it paid to him at once.—*Saunders* v. *Vautier*, 4 B. 115.

LEGACY DUTY. See WILL, 15.

MAINTENANCE. See WILL, 24.

MARRIAGE.

(*Acts of* 4 *Geo.* 4, *c.* 76, *s.* 17, *and* 6 *&* 7 *Will.* 4, *c.* 75.) On a petition under the 4 Geo. 4, c. 76, s. 17, to the Lord Chancellor, for his consent to the proposed marriage of an infant daughter of a person non compos mentis, a reference was directed to the master, and a statement of facts containing a proposal for a settlement was carried in by the intended husband, supported by his affidavit. The master made his report in favour of the marriage, which was confirmed. The parties subsequently entered into a fresh arrangement, and without availing themselves of the consent of the Lord Chancellor were married by banns, under the 6 & 7 Will. 4, c. 85 :—Held, that the proposal laid before the master was a contract which the Court would enforce, and not permit the parties to vary without the sanction of the Court.

A party named a trustee in the articles, but who had not acted or executed any deed of trust, was allowed to sustain the suit for their performance.—*Cook* v. *Fryer*, H. 498.

MARRIAGE ARTICLES.

(*Construed in favour of issue.*) By marriage articles, a husband covenanted, in consideration of his wife's portion, to settle an estate to his own use, and after his decease to the use of *his heirs on the body of his intended wife*, and for want of such issue *to his own right heirs for ever*. The articles did not express any further intention of providing for the children of the marriage, and made a provision for the intended wife *in lieu of dower*. No settlement was executed; and the husband mortgaged the estate, and at the same time delivered the articles to the mortgagee: Held, on his death, that under the articles, he was entitled to a life estate only, and that the mortgagee took with notice, and could not therefore hold as against the issue of the marriage.—*Davies* v. *Davies*, 4 B. 54.

MARRIED WOMAN.

(*Admission of will.*) The admission of a will in the answer, whether joint or separate, of a married woman who is the heiress-at-law of the testator, is not sufficient evidence to enable the Court to declare the will established.—*Brown* v. *Hayward*, H. 432.

MORTGAGE.

1. (*Collateral Security—Policy of Assurance.*) Although it is the rule generally that a mortgagee may first realise his collateral securities and then foreclose for the balance; yet where a policy of assurance on the life of the mortgagor was upon a further advance being made assigned as a collateral security, with a declaration of trust that the mortgagee should stand possessed of *the monies to be received under the policy* upon trust to pay his debts, &c., and without any power of sale; the Court held this declaration to be a ground for excluding the right of sale which the mortgagee would otherwise have had, but allowed the mortgagee to foreclose, retaining the policy; the Court observing that it

would have power to interfere if the policy was used for the purpose of obtaining more than the value of the debt.—*Dyson* v. *Morris*, H. 413.

2. (*Conditional sale.*) A. having become the purchaser of an estate by auction, first borrows of B. the money required for payment of the duty and the deposit, then a sum of 1000*l.*, and then enters into an agreement with B. that in consideration of the above sums the whole of the purchase should be conveyed to him, provided that if A. should by a certain day repay to B. the 1000*l.* and the whole purchase money of the estate (which B. would then have paid) with interest, the agreement should be void, otherwise the sale to be confirmed: Held, that this was a conditional sale and not a mortgage.—*Perry* v. *Meddowcroft*, 4 B. 157.

3. (*Foreclosure—Receipt of rent.*) A mortgagee received rents between the master's report and the day fixed for payment: default being made, held, that the mortgagee was not then entitled to an order absolute.—*Garlick* v. *Jackson*, 4 B. 154.

4. (*Foreclosure—Infant.*) The Court refused to direct a sale adversely on application on behalf of infants partially interested in equity of redemption.—*Farrow* v. *Rees*, 4 B. 18.

5. (*Notice of constructive equity.*) See MARRIAGE ARTICLES.—*Davies* v. *Davies*, 4 B. 54.

6. (*Power of sale to secure charge.*) A conveyance of an estate in trust, that it should stand charged with payment of a sum of money and interest, with a power of sale on default in payment after notice, is not a mortgage, but the trustee is entitled to the aid of the Court in effecting the sale.—*Sampson* v. *Pattison*, H. 533.

7. (*Retainer of deeds by mortgagor.*) A party entitled to an estate, subject to terms vested in trustees for securing a jointure and portions, mortgaged it, but retained the title deeds in his possession: Held, that this omission on the part of the mortgagee was not sufficient to postpone him in favour of a subsequent purchaser for valuable consideration.—*Farrow* v. *Rees*, 4 B. 18.

And see PRODUCTION OF DOCUMENTS, 1.

NOTICE.

(*Recital.*) A general recital in a deed that there were mortgages on the estate, held to affect parties claiming under the deed with notice of a mortgage not specified therein.—*Farrow* v. *Rees*, 4 B. 18

PARTIES.

1. (*Administration of assets—Breach of trust.*) Where a bill was filed by a legatee stating that the executor and the residuary legatee had concurred in representing to plaintiff that his legacy was only 4000*l.* instead of 5000*l.* which it really was, and in giving him a joint bond for the smaller amount; that the executor having wound up the estate, paid over the residue, amounting to more than 1000*l.*, to the residuary legatee; and the bill was filed to recover the amount from the representatives of the executor and the residuary legatee: Held, on demurrer, that the representative of the testator was not a necessary party.—*Beasley* v. *Kenyon*, 3 B. 544.

2. (*Breach of trust.*) Held, in a case before the Orders of August, 1841, that all parties liable for a breach of trust must be before the Court; the Court

adverting to the inconvenience of the rule. See NEW ORDERS, xxxii.—*Perry* v. *Knott*, 4 B. 179.

3. (*Class of persons—Inquiry before master.*) The Court will not decide a question affecting a class of persons, nor decree a distribution amongst a class without evidence that the whole of the persons constituting such class are before the Court.

In case of a distribution of a fund amongst a class, the usual mode of proving that the whole of the class is present, is by inquiry before the master.

Quære, whether the same mode of proof is invariably required when the question is between the class and one claiming adversely to the class.—*Hawkins* v. *Hawkins*, H. 543.

4. (*Specific performance—Heir at law.*) The heir-at-law of the vendor of real estate is a necessary party to a suit for specific performance by the administrator of the vendor against the purchaser.

N. B. The objection for want of parties was taken by answer, and the cause set down under the Order xxxix. of August 1841.—*Roberts* v. *Marchant*, H. 547.

5. (*Specific performance—Trust.*) A. purchased a leasehold of B. and paid the purchase money, but no conveyance was executsd. A. bequeathed it to B. for life, with remainders over. A.'s executor filed a bill against B. alone for a conveyance of the property upon the trusts of the will, not, however, seeking to recover it as assets for the purposes of the executorship: Held, that the other *cestui que trusts* were necessary parties; and, *semble*, that such a suit might be maintained.—*Josling* v. *Karr*, 3 B. 494.

6. (*Supplemental bill.*) As to where the parties to the original bill ought to be made parties to the supplemental bill, and where they ought not, see observations in *Dyson* v. *Morris*, H. 413.

And see ADMINISTRATION SUIT; PLEADING, 3, 4; PRACTICE, 3, 12, 13.

PARTITION.

1. (*Estate of plaintiff.*) A party having a life estate, determinable on his marriage, in one-fifth of an estate, is entitled to a decree for partition.—*Hobson* v. *Sherwood*, 4 B. 184.

2. (*Partial decree.*) Where, in a suit for partition, the defendants are desirous that there shall be no partition of their several shares, the partition may be confined to the *aliquot* share of the plaintiff.—*S. C.*

PAUPER.

(*Suit by or against executor.*) An executor or administrator cannot sue or defend in formâ pauperis.—*Oldfield* v. *Cobbett*, 3 B. 432.

PLEA.

1. (*Discovery.*) *Quære*, whether a mere negative plea can be put in to a bill of discovery in aid of an action at law.—*Chadwick* v. *Broadwood*, 3 B. 530.

2. (*Duplicity—Vagueness.*) To a bill by the representatives of A., a Spanish subject, against B., another Spanish subject resident, for an account of the profits of a contract made by B. with the Spanish government, in which B. had agreed to give A. a share, B. pleaded that such agreement was void and illegal, because A. had then an office of trust under the Spanish government; and the plea also averred, that such agreement was a crime subjecting the parties to it to penalties by the laws of Spain: Held, that the plea was not bad for duplicity nor for vagueness.—*Heris* v. *Riera*, S. 318.

3. (*Multifariousness—Heirship—Seisin and descent.*) Where a bill of discovery was filed, founded on the alleged heirship of A., the plaintiff, to B., and stating the several seisins and descents upon which A. made out his title through his grandfather, to whom he alleged the estate first descended from B., in right of his father, who was the elder brother of B., and a plea was put in to the effect that A. was not the heir of B., and severally denying the several seisins and descents on which he relied, and ending, "for that B. never had an elder brother:" the plea was overruled as multifarious.—*Chadwick* v. *Broadwood*, 3 B. 530.

And see AGREEMENT, 2.

PLEADING.

1. (*Answer—Recent acts of defendant.*) There is no rule that a defendant must answer affirmatively or negatively his own recent facts. All that the Court can do is to compel a defendant to afford such a discovery as he swears he is able to give.—*Nelson* v. *Ponsford*, 4 B. 41.

2. (*General relief.*) A party having a claim to the renewal of a lease, either under a covenant in the existing lease, or under a trust for renewal in a conveyance to a party upon trust to grant leases, under which trust the existing lease had in fact been granted, filed his bill, stating the above facts, and praying for performance of the covenant, or for general relief: Held, that the latter prayer entitled him, as far as pleading went, to the benefit of the trust.—*Walker* v. *Jeffreys*, H. 341.

3. (*Implication.*) Where there were three executors named in the will, an allegation that two of them proved, and were the personal representatives of the testator, without adding that they proved alone, or that the third did not prove, was held sufficient, when supported by production of the probate as evidence, to justify the omission of the third person as party.—*Dyson* v. *Morris*, H. 413.

4. (*Multifariousness—Executors—Trustees.*) To a bill filed by a creditor of a firm on behalf of himself and all others, against the respective executors and devisees of A. and B., two deceased partners of the firm, and the assignees in bankruptcy of the other partners, in order to charge the real and personal estates of A. and B. respectively with what the partnership assets had been deficient to pay, neither the executors of A. nor B. having proved their respective wills, but it being alleged that they had possessed themselves respectively of their testators' assets: a demurrer for multifariousness was overruled. But an objection made *ore tenus* that no properly constituted personal representatives of A. and B. were parties, was allowed without costs.—*Brown* v. *Douglas*, S. 283.

5. (*Multifariousness—Twofold injury by same party.*) A bill to restrain the same defendants, being commissioners of sewers, from paving one part of defendant's property and draining another, is not multifarious.—*Birley* v. *The Constables of Chorlton*, 3 B. 499.

6. (*Partial answer.*) The rule that a defendant who answers at all must answer fully, does not apply to such parts of the bill as are immaterial to the relief prayed.—*Wood* v. *Hitchings*, 3 B. 504.

And see PARTIES, 3.

POLICY.

(*Assignment—Suicide.*) Where a policy was effected, with a condition that if assigned bonâ fide the assignee should have the benefit of it, notwithstanding the assured should commit suicide, and the assured did afterwards deposit it with a creditor as a security, together with a letter binding himself to assign it

when requested, and he afterwards did commit suicide: Held, that this was a sufficient assignment within the terms of the condition.—*Cook* v. *Black*, H. 390.

POWER. See WILL, 18.

PRACTICE.

1. (*Abatement—Revivor.*) On the death of one of two co-plaintiffs after the cause was at issue, it was ordered, on motion, that the survivor should revive the suit within a fortnight, or, in default, that the bill should be dismissed with costs.—*Lord Chichester* v. *Hunter*, 3 B. 491.

2. (*Abatement—Sole plaintiff.*) In a suit abated by the death of a sole plaintiff, an inferior branch of the Court will not order that his representatives shall revive within a limited time, or in default, that the bill shall be dismissed. *Sed quære*, whether the chancellor would not amend the practice in this respect.—*Lee* v. *Lee*, H. 617.

3. (*Absent party.*) A cause stood over for want of parties; one of such parties was brought before the Court, but another was out of the jurisdiction. Liberty was given to enter into evidence as to the former, and to prove the latter out of jurisdiction.—*Willats* v. *Busby*, 3 B. 420.

4. (*Amendment—Jurisdiction of master.*) All the defendants having answered, the plaintiff obtained an order to amend, and added new defendants. The answers of the original defendants became sufficient: Held, that any application for a further order to amend must be made to the Court, and not to the master.—*Haddlesea* v. *Nevile*, 4 B. 28.

5. (*Appearance—Injunction and receiver.*) An injunction may be obtained before appearance upon personal service of the notice of motion; but a receiver cannot, except leave be given to serve the notice personally.

Such leave will not be granted unless it appear that the plaintiff has used due diligence to compel an appearance.—*Ramsbottom* v. *Freeman*, 4 B. 145.

6. (*Change of next friend.*) Such a change, made pending the examination of witnesses, need not be noticed in proceedings under commission.—*Lincoln* v. *Wright*, 4 B. 166.

7. (*Contempt—Erroneous order.*) Although a party is bound to obey an erroneous order obtained against him ex parte, he is not precluded by his disobedience from seeking to set it aside.—*Fennings* v. *Humphery*, 4 B. 1.

8. (*Contempt—Order to elect.*) *Quære*, whether an order to elect between an action and a suit operates as an injunction to stay proceedings in the action.—*Ibid.*

9. (*Costs against successful party.*) A successful plaintiff may be made to pay the costs of unnecessary proceedings, and if those proceedings can be clearly distinguished from the others, the Court will make the order without a reference. *Farrow* v. *Rees*, 4 B. 18.

10. (*Costs—Irregular order.*) An order "to discharge an irregular order with costs," carries the costs of the application to discharge it.—*West* v. *Smith*, 3 B. 492.

11. (*Costs—Lunacy.*) A bill was filed on behalf of an infant, with the sanction of the master, to set aside deeds executed by a lunatic at a time subsequent to that at which he had been found lunatic by inquisition. An issue having been directed, the jury found in favour of the deeds. The bill was dismissed with costs of suit and of the issue.—*Frank* v. *Mainwaring*, 4 B. 37.

12. (*Defect of parties.*) A party named in the bill, though he has not appeared or been served with a subpœna, may, with the consent of the plaintiff only, be admitted to appear at the hearing, and be bound by the decree. But in the case of a person not named as a party to the bill, the consent of all parties is required.—*Dyson* v. *Morris*, H. 413.

13. (*Same.*) On an application for payment of money into Court, it was objected that persons having an interest were not before the Court. The order was made on the undertaking of the plaintiff to make them parties.—*Whitmarsh* v. *Robertson*, 4 B. 26.

14. (*Dismissal—Bankrupt co-plaintiff.*) Bill dismissed with costs for want of prosecution, one of two co-plaintiffs having become bankrupt, and the other appearing on the motion, but declining to proceed with the cause.—*Kilminster* v. *Pratt*, H. 632.

15. (*Dismissal—Costs.*) Where, after notice of motion to dismiss, plaintiff takes a step which defeats the right to dismiss, as by getting an order to amend, he must pay the costs of the motion.—*Waller* v. *Pedlington*, 4 B. 124.

16. (*Dismissal—Delay as to commission—17th Order.*) Where a plaintiff three days after the time allowed by the 17th Order, sued out an order for a commission, which he did not serve till three days later, the Court refused, but without costs, a motion to dismiss, but doubted whether plaintiff was entitled to his commission.—*Strickland* v. *Strickland*, 4 B. 120.

17. (*Dismissal—Replication—Costs.*) On the 25th of July the defendant served notice of motion to dismiss to be made on the 29th, the next seal. On the 27th the plaintiff replied, and tendered 20*s.* costs to defendant, which defendant refused to accept until he had ascertained whether he ought to do so or not. At eight o'clock in the evening of the 28th the plaintiff instructed counsel to appear on the motion. At ten in the morning of the 29th the defendant agreed to accept the 20*s.* costs. The Court held that he was too late, and ordered him to pay the costs of the motion, minus 20*s.*—*Piper* v. *Gittens*, S. 282.

18. (*Examination of defendant.*) An order of course, obtained by the plaintiff to examine a defendant against whom a replication has been filed, is irregular.—*Holmes* v. *Mayor of Arundel*, 4 B. 155.

19. (*Exceptions, where immaterial.*) Where upon a cause coming on upon exceptions, the decision of the cause upon the merits would be the same whether the exceptions be allowed or not, the Court may dispose of the cause without making any order on the exceptions.—*Hall* v. *Laver*, H. 571; *Robinson* v. *Milner*, H. 578, in note.

20. (*Time for excepting—Contempt.*) Where a defendant, in contempt for want of answer, files it without paying or tendering the costs of the contempt, but they are afterwards accepted by the plaintiff, the time to except under the 4th Order (1828), runs from the filing of the answer, and not from the acceptance of the costs.—*Micklin* v. *Patten*, 4 B. 126.

21. (*Form of issue as to lunacy.*) Form of issue for trying the validity of deeds executed by a party found by inquisition to have been a lunatic from a time anterior to the execution of the deed.—*Frank* v. *Mainwaring*, 4 B. 37.

22. (*Hearing of cross suits.*) The order for hearing cross suits at the same time, does not preclude the Court from making a separate decree on each.—*Dodd* v. *Lydall*, H. 333.

23. (*Information.*) Notice of motion given *on behalf of a relator* in an information

held irregular; it should be on behalf of the Attorney-General.—*Attorney-General* v. *Wright*, 3 B. 447.

24. (*Insufficiency—Reference.*) Though a defendant may put in a further answer before the certificate of the master as to the insufficiency of his former has been filed, yet the plaintiff cannot refer the second answer until after the filing of the certificate.—*Pearce* v. *Gray*, 4 B. 127.

25. (*Irregularity—Acquiescence.*) A party who had knowingly acquiesced in and adopted an irregularity, was held not entitled to suppress depositions of the other party for such irregularity apparent on their title. The irregularity was, that the name of a deceased person was used as that of the next friend of infant plaintiff.—*Lincoln* v. *Wright*, 4 B. 166.

26. (*Irregular order—Abandonment—Costs.*) A party who has served and proceeded on an irregular order of course, is not at liberty to abandon it upon tender to his adversary of the costs. The order must be considered as a valid and subsisting order, until it is disposed of in some regular course; and when costs are due to a party, the amount must be ascertained in a regular course.

Where an irregular order has been obtained, no subsequent order to the same effect can be had until the former has been discharged.—*Pearce* v. *Gray*, 4 B. 127.

27. (*Jurisdiction of master—Enlargement of publication.*) Cases stated, which though they came within the letter of the 3 & 4 Will. 4, c. 94, s. 13, yet the applications ought to be made to the Court in the first instance, and not to the master. A simple application to enlarge publication, involving no specialty, should be made to the master in the first instance, and not to the Court.—*Strickland* v. *Strickland*, 4 B. 146.

28. (*New orders—Form of decree.*) A decree directing an act to be done and not fixing the time within which the act is to be done, is not inoperative, as not being in the form prescribed by the 12th amended order of August, 1841; but the Court will on motion fix the time within which the act is to be done. The four-day order cannot be made in such a case.—*Needham* v. *Needham*, H. 634.

29. (*Same—Memorandum of Service.*) On a motion for leave to enter a memorandum of service of a copy of the bill on a defendant under this order, it is not necessary to show by affidavit that such defendant is not an infant.

N. B. The facts of which an affidavit is required are summarily stated in note to this case.—*Welch* v. *Welch*, H. 593.

30. (*Same—Numbering interrogatories—Sole defendant.*) The 17th, 18th, and 19th of the New Orders of 1841, do not apply to the case of a sole defendant so as to excuse him from answering interrogatories not numbered. And where a defendant in such a case put in an answer simply denying that the plaintiffs were entitled to the relief prayed, and such answer was put in under an order for further time, the original time for answering having expired, the answer was ordered to be taken off the file.—*Lynch* v. *Lecesne*, H. 626.

31. (*Allowance charged on real estate.*) An order for payment of an allowance to a lunatic out of the rents and profits of lunatic's real estate, does not constitute a debt against the personal estate of the lunatic for the arrears of the allowance due at his death.—*Jones* v. *Bruce*, S. 221.

32. (*Priority of orders served on same day.*) An order to set down exceptions for argument obtained by the defendant and served on the plaintiff on the same

day as, but after, the plaintiff had served the defendant with an order to answer amendments and exceptions at the same time, discharged on motion.—*Earl of Glengall* v. *Blaird*, H. 624.

33. (*Pro confesso.*) Under the 1 Will. 4, c. 36, a decree cannot be taken pro confesso on motion, even where there is but one defendant.—*Collins* v. *Collyer*, 3 B. 600.

34. (*Reference.*) The Court will not pending a reference interfere with the discretion of the master as to his proceedings under that reference, except the application to the Court for its direction is made at the desire of the master himself.—*Maddeford* v. *Anstwick*, S. 209.

35. (*Restraining order—Distringas.*) The 5 Vict. c. 5, does not enable the Court to adjudicate on the rights of the parties upon petition or motion without a bill filed, and consequently the restraining order unde the 4th section of that act will not be continued after time has been afforded for filing a bill and no bill has been filed.

Semble, that, notwithstanding the case of Exp. Amyot, Phillips, 129, n., a party who has obtained a distringas under the 5th section of the act of 5 Vict. c. 5, may obtain a restraining order under sect. 4 of same act.

Quære, whether a Court of Equity will in any case afford interim protection to the property of a person who, having been deprived of it by alleged felony, is prosecuting the offender.—*Re 5 Vict. and Marquis of Hertford*, H. 584

36. (*Stop order.*) Principles on which it was considered necessary, previous to the General Order of April 3, 1841, to serve all parties interested with an application for a stop order.—*Day* v. *Croft*, 4 B. 34.

37. (*Title of orders.*) It is not irregular to intitule an order for a commission to examine witnesses, or the commission or the return thereof, in a short form, as a suit in which "A. and others are Plaintiffs," and "B. and others Defendants."—*Lincoln* v. *Wright*, 4 B. 166.

38. (*Trial of title on petition.*) A. having got from B. an assignment of the reversion of a fund in Court, and then obtained a stop order, afterwards when the fund fell in petitioned for its payment to him, but B. then contested the validity of the assignment; the Court refused to try that point on petition, but offered to retain the fund if B. would undertake to file a bill.—*Bethune* v. *Kennedy*, 3 B. 462.

39. (*Undertaking to speed—Filing replication.*) A plaintiff who has undertaken to speed the cause, according to the terms of the 16th Order of 1831, is not bound to file a replication within three weeks from the date of his undertaking, if he does not require a commission.—*Darby* v. *Smale*, H. 490.

40. (*Withdrawal of plaintiff.*) One of two plaintiffs who had authorised the institution of a suit refused to proceed in it. Ordered, at the instance of the other plaintiff, that he should be made defendant and pay the costs.—*Brown* v. *Sawer*, 3 B. 598.

And see Draining Act; Interpleader, 2, 5; Parties, 3; Production of Documents, 4.

PRIVY COUNCIL. See Discovery, 2.

PRODUCTION OF DOCUMENTS.

1. (*By mortgagor in absence of mortgagee.*) Where mortgagor was held liable as between himself and plaintiff to produce title deeds of property in mortgage, which deeds were in possession of mortgagee, but the mortgagor had copies,

he was ordered to produce them though the mortgagee was not a party.—*Hercy* v. *Ferrers*, 4 B. 97.

2. (*Grounds of objection.*) If documents scheduled to an answer be admitted by the answer to be relevant to the plaintiff's case, a suggestion that they will not prove such case will not exempt them from production, nor will a suggestion that they relate to the defendant's title; but the suggestion must be that they relate *exclusively* to defendant's title.—*Smith* v. *The Duke of Beaufort*, H. 507.

The claim of protection against production must be set out in definite and precise terms.—*S. C.*

3. (*Minute of evidence.*) A surveyor's valuation of property in question in the suit, made with reference to the suit and claimed to be exempted from production on the ground that it was evidence in support of defendant's case, and not of plaintiff's: Held to be exempt, not on that ground, but on the ground that it was not evidence at all, but a minute of evidence procured since the dispute in the cause arose.—*Llewellyn* v. *Badeley*, H. 527.

4. (*Objection by affidavit.*) The defendant may by affidavit show that particular documents scheduled to his answer ought not to be produced.—*Smith* v. *Duke of Beaufort*, H. 507.

(Same point decided same way.)—*Llewellyn* v. *Badeley*, H. 527.

5. (*To ascertain what subject to plaintiff's claim.*) The plaintiff was entitled to a legacy which the testator had charged on his estates not in settlement. The defendant stated that the testator was tenant in tail of part of the estate, but did not specify it; and he admitted the possession of a copy of a deed creating the entail, but he stated it did not make out the plaintiff's case: Held, he was bound to produce it for the plaintiff's inspection, as tending to show what estates were in settlement.—*Hercy* v. *Ferrers*, 4 B. 97.

And see MORTGAGE.

RECEIVER.

1. (*Discharge of.*) A receiver being appointed for the benefit of all parties will not be discharged on the application merely of the party at whose instance he was appointed; but where a receiver had been appointed on account of the neglect of previous trustees, the Court on the appointment of new trustees discharged him, the new trustees undertaking to pass their accounts half-yearly.—*Bainbrigge* v. *Blair*, 3 B. 421.

2. (*Disclaimer by one of several trustees.*) Where there are several trustees the disclaimer of some of them is not alone a sufficient ground for the appointment of a receiver, without the consent of those who remain.—*Browell* v. *Reed*, H. 434.

3. (*Effect of appointment on legal rights of parties.*) Where a receiver had been appointed in this Court, with directions to pay the rents to a tenant for life against whom an order for costs in another suit had been made in the Exchequer: it was held, that the appointment of the receiver was no bar to a writ of elegit under the 1 & 2 Vict. c. 110, s. 20, against the life estate of the party liable to the costs.—*Gooch* v. *Haworth*, 3 B. 428.

4. (*Where there is a guardian.*) The appointment of a testamentary guardian of an infant by his father, does not under the statute 12 Car. 2, c. 24, constitute any objection to the appointment of a receiver of the estate of the infant.—*Gardner* v. *Blane*, H. 381.

RENEWAL OF LEASEHOLDS.

(*Fines on renewal—tenant for life—and remainder-man.*) Leaseholds for lives

being devised in trust for parties in succession, with a direction to renew out of the rents or by mortgage, the Court sanctioned a reference to the master, to inquire whether it would be for the benefit of all parties that the future fines for renewal should be provided by an insurance on the lives of the *cestui que vies.* Difficulties in arranging the proportions of the fines which the parties in succession ought to bear in such cases.—*Greenwood* v. *Evans*, 4 B. 44.

And see TRUSTEE, 3.

SALE UNDER DECREE.

1. (*Discharge of purchaser.*) The Court will not entertain a motion by the purchaser for a reference, whether it would be for the benefit of all parties to rescind the contract.—*Stubbs* v. *Sargon*, 4 B. 90.

2. (*Proceeding at law by purchaser.*) A purchaser under the Court, not being able to obtain an account-book delivered over to him, to which he was entitled under his contract, brought an action of trover against some parties to the cause. He was restrained by injunction.—*S. C.*

SET-OFF.

(*Mortgage and trust accounts.*) One of several trustees of a real estate having become mortgagee of the trust estate, partly by taking an assignment of a mortgage prior to the trust, partly by taking an assignment of a mortgage created under the trust, and partly for money which he had lent to the *cestui que trust*, filed his bill for foreclosure simply. The *cestui que trust* of the equity of redemption filed his bill for an account of the trust and of the mortgages, and that the mortgage securities might stand only for the balance due on both accounts; and the plaintiff obtained an order for hearing both causes together. The Court, observing that such an order did not preclude it, as not being made upon the merits, and that the mere existence of cross equitable demands was not of itself a sufficient ground for set-off, refused to make one decree for taking both accounts together, except on the terms of plaintiff in the second suit paying into Court the amount of principal and interest due upon the mortgage.—*Dodd* v. *Lydall*, H. 333.

SETTLEMENT.

1. (*Appointment—Shifting use—Case for court of law.*) An estate was settled (subject to a general power of appointment reserved to the settlor) on himself in tail, remainder to A. and his sons in strict settlement in tail male; remainder to B. for life, with remainders over, but with no ultimate remainder to the settlor and his heirs. And the settlement contained a proviso, in the event of the family estate coming to A. or his issue male, for shifting the uses as if A. were dead without issue male. The settlor by will appointed the estates to the first son of A. and his sons, in strict settlement in tail male, with remainder to the use of the right heirs of C. deceased. The will contained a proviso, in the event of the family estates of A. coming to any tenant for life under the limitations in the will, for shifting the uses to the person next in remainder under the limitations of the will. The testator devised his copyhold estates to the same uses, and devised the residue of his real and personal estates to D. (the plaintiffs). A. became entitled to the family estates in the settlor's life-time. The settlor died in 1824, and on his death the first son of A. entered into the possession of the settled estates, and on the death of A., in 1833, became entitled in possession to the family estate, and died shortly afterwards, without having had any issue. A bill was then filed by D., for an account of the rents

from A.'s coming into possession of the family estate, to the time of his death, and also for possession of the estate settled; and a claim was also made by the heir of C. and by B., and the second son of A., under the limitations of the settlement. The Court decided against the claims of the heir of C. and D., and at the request of counsel sent a case to the Exchequer, as to the claims of B. and the second son of A., although the Court thought the point reasonably clear, and though the legal fee was in trustees, the right depending on the construction of the shifting clause in the settlement. The barons certified in favour of B. (see 8 Mees. & Wels. 194), and the decree was made accordingly.—*Morrice* v. *Langham*, S. 260.

N. B.—An appeal against this decree is pending in the Lords.

2. (*Construction—Appointment—Hotchpot.*) Under a marriage settlement, a husband and wife, having power to appoint a portion of a trust fund amongst the children of the marriage (to the remaining portion of which the children were entitled absolutely under the settlement), and mistaking the extent of their power, made appointments to two of the children which more than exhausted the appointable part of the fund; each deed of appointment containing a hotchpot clause. Held, that the second appointment must fail, so far as there was not an appointable fund to answer it, and that the second appointee, as well as the first, was bound, in order to share in the unappointable part of the fund, to bring into hotchpot the whole of the fund he would get under the appointment, or if he retained that, the whole of the unappointable fund belonging to the children who did not claim under any appointment.—*Warde* v. *Firmin*, S. 235.

3. (*Construction—Executors of wife.*) By an ante-nuptial settlement, money, the property of the wife, was settled in trust for her separate use for life, for her husband for life, and for the children of the marriage, equally subject to her appointment by deed or will, and in default of children, for such persons as she should appoint by deed or will, and in default of appointment, that *the trustees should pay and transfer the same to her executors or administrators;* and the husband covenanted, that in case he should die without issue in his life, and make no appointment, the same should remain for the use and benefit of *her executors, administrators, and assigns.* Held, that by the executors or administrators of the wife, her next of kin were meant. This case was appealed and compromised.—*Daniel* v. *Dudley*, S. 163.

4. (*Construction—Suspension of trust—Maintenance.*) By a marriage settlement, stock, the property of the wife, was settled in trust for the husband during the joint lives of himself and wife, with remainder to the survivor for life, with a proviso, that if the husband should survive and marry again, his interest in a moiety of the funds should cease, and that moiety be paid and transferred as if the husband were dead. And as to all the stock (subject to a power to the husband and wife or survivor to appropriate the funds amongst all the children) on trust for all the children (except an eldest or only son, *who for the time being should be entitled to the husband's real estates, under a deed of even date*), the shares to be vested at twenty-one or marriage, but not to be transferred till the death of the surviving parent. And the trustees were directed, *after the death of both parents*, to apply as much as they should think fit of the income of each child's share, until its share should become transferable, for its maintenance, and should accumulate the surplus. The trustees were also empowered to advance the children out of the capital of their shares, although they should be under twenty-one. The wife died. There was issue of the marriage, sons and daughters. No appointment was made, except by the father to the eldest son,

and the father then married again. Held, that as, during the life of the father, it could not be determined whether the eldest son would be the person entitled to the real estates, there must be a suspension of the trusts for the benefit of the children until the death of the father, and all that could be done was to accumulate the moiety of the fund forfeited during the life of the father: that the maintenance and advancement clauses must be taken together; and if the father was not of ability to maintain his children, there might be a reference in order that maintenance might be provided for them out of the trust fund.—*Kekewich* v. *Langston*, S. 291.

5. (*Release from settlement by divorce.*) A settlement was made of the choses in action of a female infant, on her marriage, in trust for her husband for life; and after his decease, in trust for her for life; and after the death of the survivor, and in default of children, in trust for such persons as she should *by will* appoint, with *ultimate trust for her next of kin.* The marriage, of which there was no issue, was dissolved by act of parliament, and the husband executed a release of his rights in her property under the settlement. Held, that the property of the wife was not bound by the settlement.—*Hastings* v. *Orde*, S. 205.

SOLICITOR.

(*Payment of deposit to solicitor.*) On a contract for purchase, a part of the purchase-money was paid as a "deposit" to the vendor's solicitors, who paid it away at the desire of the vendor, without the concurrence of the purchaser. This created a difficulty in completing the purchase, as a mortgagee of the estate would not join in the conveyance without payment to him of the deposit. In a suit by the purchaser for specific performance, the solicitors were declared liable to make good the money.—*Wiggins* v. *Lord*, 4 B. 30.

SOLICITOR AND CLIENT.

1. (*Authority to act—Adoption.*) If a solicitor has used the name of a party as plaintiff in a suit with his knowledge, but without his authority, and such party allows the suit to proceed without taking steps to have his name removed from the record, this will not be an adoption of the solicitor, nor equivalent to a retainer of him by the party.—*Hall* v. *Laver*, H. 571.

2. (*Employment—Trust estate—Lien for costs.*) The employment of a solicitor in business relating to the trust estate by the authority of the trustee, or of some of several cestui que trusts, gives the solicitor no lien or charge upon the trust estate, or upon the shares of the other cestui que trusts, for costs incurred in relation to the trust.—*S. C.*

3. (*Lien—Fund in court.*) The lien of a solicitor upon a fund recovered in a suit which he has conducted, is confined to the costs of that particular suit.—*S. C.*

SPECIFIC PERFORMANCE.

1. (*Action and suit on different parts of agreement.*) A. agreed to grant a lease of a vault to B., and also to erect a crane, &c., and do within a given time certain other acts which this court could not decree to be specifically performed. A. having made default, B. sued in this Court for a specific performance, but did not pray that the above stated acts should be specifically performed. Pending the suit, B. also commenced an action at law against A. for damages suffered in consequence of the nonperformance of the acts: Held, that the suit and ac-

tion were not for the same matter, and an order to elect, obtained by the defendant, was discharged.—*Fennings* v. *Humphery*, 4 B. 1.

2. (*Injunction against vendor.*) Injunction in a suit for specific performance, to restrain a vendor from letting or selling the estate, refused.—*Turner* v. *Wright*, 4 B. 40.

3. (*Refusal—Acquiescence.*) Where a lease was granted with a covenant to grant, upon application by the lessee, a further reversionary lease of twenty-one years, and the lessee having applied and been refused, on the alleged ground of non-performance of the covenants in the existing lease, took no steps to enforce his right for nearly two years and a half: Held, that he had lost by acquiescence his right to specific performance in equity.—*Walker* v. *Jeffreys*, H. 341.

4. (*Reference as to title.*) Although the defence of the purchaser was, that time was of the essence of the contract and that the abstract had been delivered too late, yet the Court granted on motion a preliminary inquiry as to whether the title was good, and when it was first shown to be so.—*Foxlewe* v. *Amcoat*, 3 B. 496.

And see PARTIES, 3.

STATUTE OF LIMITATIONS.

(*Account against trustee and executors.*) Where upwards of twenty years had elapsed after an executor had settled the accounts of his testator's estate with the residuary legatee, and had given up all interference in the trust, it was held that the onus was on the residuary legatee to prove that the conduct of the executor was a breach of trust, as it was alleged to be by retainer of the assets in trade; and that the onus was not shifted by an admission that the account was settled on a misunderstanding of the rights of the parties, by which the residuary legatee was prejudiced.—*Portlock* v. *Gardner*, H. 594.

And see TRUST, 1.

TAXATION OF COSTS.

1. (*Costs of taxation—Jurisdiction.*) The Court has jurisdiction to deal with the costs of taxation of a solicitor's bill, although that jurisdiction is not founded on the statute 2 Geo. 2, c. 23; 30 Geo. 2, c. 19, s. 75. And in a suit against a solicitor for an account and taxation of his bills, the Court may give or withhold the costs of taxation, notwithstanding more than a sixth part of the bill has been disallowed.—*Barton* v. *Pyne*, H. 493.

2. (*Reference to items taxed by previous order.*) *Quære* whether, where after the taxation of a particular bill of costs as between solicitor and client, a general taxation is directed, a solicitor can include items included in the former taxation, but not allowed, or ought, for the purpose of explanation, to introduce items taxed and paid on the former taxation.—*Tarbuck* v. *Tarbuck*, 4 B. 149.

3. (*Review of certificate, grounds for.*) Principles on which the Court acts in permitting a review of such certificate. The Master, on evidence before him, allowed a few items on the taxation of a solicitor's bill for business, as to which there was a contest whether the solicitor had authority to perform it: Held, that this was not a sufficient reason for permitting a review of the taxation.—*Re Congreve*, 4 B. 87.

4. (*Review of certificate.*) On a petition for leave to file exceptions to Master's certificate of taxation, which is the only mode of questioning such certificate, the Court will sometimes decide itself upon the items complained of, and will not refuse to go into them on the ground of the time it may take to discuss them.—*Re Congreve*, 4 B. 87.

5. (*Varying order—Correcting Master—Time of application.*) In *October*, 1839, a client obtained an order to tax his solicitor's bill. He commenced the taxation in *January*, 1840, and proceeded therein to a very considerable extent. A year and a half after, and before the report, the client applied to vary the order: Held, that after his acquiescence, he came too late to alter the order, and too early to correct any erroneous principle acted on by the Master.—*Tarbuck* v. *Tarbuck*, 4 B. 149.

THELLUSSON ACT.

(*General direction to accumulate.*) Under a general direction to accumulate for the benefit of unborn grandchildren of the testator, an accumulation for twenty-one years from the testator's death only will be allowed.—*Ellis* v. *Maxwell*, 3 B. 587.

TIMBER.

(*When cut during tenancy for life.*) Reference granted on bill by tenant in tail, whether it be for the benefit of the plaintiff and the other parties to cut timber during the continuance of the estate of a tenant for life of the lands, impeachable of waste. Principles upon which such references granted.—*Tollemache* v. *Tollemache*, H. 456.

TRUST.

1. (*Implied trust—Lapse of time.*) A Court of Equity will not after a great lapse of time (as of more than twenty years), and where no actual fraud is proved, enter into inquiries for the purpose of raising an implied trust against a defendant, although the same lapse of time would be no bar to a claim founded upon an express trust.—*Portlock* v. *Gardner*, H. 594.

2. (*Investment of trust fund—4 & 5 W. 4, c. 29.*) An application made under the 4 & 5 W. 4, c. 29, to invest trust funds on *Irish* security refused, for though for the benefit of the tenant for life, as increasing his income, it was otherwise as to those in remainder, as affording a less secure investment.—*Stuart* v. *Stuart*, 3 B. 430.

3. (*Resulting or not—Executory or executed.*) Where the owner of houses conveyed them to A. upon trust to grant a lease of them to certain parties for forty-two years, with proper covenants, and upon trust to grant a further lease of twenty-one years to the lessees on their application, the lessees not being parties to this deed: Held, that this was not a resulting trust for the owner, so as to make the releasee his agent; and that it was not, either at least as to the second lease, a trust executed in the lessees, so as to entitle them to the renewal for twenty-one years, without showing that they had duly performed the covenants in the first lease.—*Walker* v. *Jeffreys*, H. 341.

4. (*Voluntary and imperfect.*) The testatrix drew a cheque on her bankers for 150*l.* in favour of A., and she verbally directed A. to apply that sum, or so much of it as might be necessary, to make up to a legatee the difference in value between a legacy of 100*l.*, which the testatrix, by her will, had given to the legatee, and the price of a 100*l.* share in a certain railway, the testatrix informing A. that she intended to give the share instead of the legacy, but she did not

think it necessary to alter her will. The bankers gave credit to A. for the 150*l.*: Held, that no trust, in respect of the 150*l.*, was created for the benefit of the legatee.—*Hughes* v. *Stubbs*, H. 476.

And see VOLUNTARY SETTLEMENT, 1, 2.

TRUSTEE.

1. (*Costs of refusal to assign.*) Parties calling upon trustees to part with their estate on the ground that the trusts are fulfilled, are bound to give them the best evidence as to that point. Accordingly trustees were held entitled to their costs who had refused to assign a jointure term, upon a statement made to them that the jointress had, by deed duly executed, released her jointure in consideration of an indemnity, but the deed was not produced to them. The trustees had not asked for its production, nor answered the letter containing the application.—*Holford* v. *Phipps*, 3 B. 484.

2. (*Interest on money retained.*) A trustee wilfully applying trust monies to his own use, is chargeable with interest at 5*l.* per cent.; but where, under the trusts of a doubtful will, the tenant for life, who was also a trustee, neglected to make proper investments, she was held chargeable with interest at 4*l.* per cent. only, and the decree was made without costs.—*Mousley* v. *Carr*, 4 B. 49.

3. (*Renewable leaseholds—Protection of tenant's right.*) Trustees of an under-lease of church property authorised to take steps to obtain a clause for compensation for their tenant's right of renewal, inserted in an act pending in parliament, to make a new street, which would require part of the property.—*Jones* v. *Powell*, 4 B. 96.

And see MARRIAGE; RECEIVER, 2.

VOLUNTARY SETTLEMENT.

1. (*Assignment by deed of expectancy.*) M., who in the event of surviving her daughter, and of that daughter dying without issue, would, as next of kin, be entitled to a fund which was vested in trustees, executed a voluntary assignment of her interest in the fund to the husband of the daughter, and declared the trusts of the assignment as to part for the benefit of M. herself, and as to another part for the daughter's husband absolutely. No notice of the assignment was given to the trustees. The daughter afterwards died without issue: Held, that there was no trust for the husband, a deed not being more effectual than any other writing to pass an equitable interest, and the interest being a mere expectancy, for which latter reason there was no estoppel.—*Meek* v. *Kettlewell*, H. 464.

2. (*Parol declaration—Injunction.*) Where upon an action being brought by an administrator to recover a debt due to the intestate, a bill was filed stating that the intestate had verbally directed a year and a half before his death that the debtor should hold the debt in trust for her, and there was evidence by affidavit to that effect, in support of a motion for an injunction to restrain the action, the Court granted such injunction, without deciding upon the existence of any trust, observing, that it would be necessary for the plaintiff to show at the hearing that there was a complete trust in the lifetime of the intestate, binding upon him.—*M'Fadden* v. *Jenkyns*, H. 458. (Affirmed by Lord Chancellor.)

WILL.

1. (*Construction—Absolute gift.*) A testator directed his trustees "to raise 5000*l.* for his daughter," his said daughter's legacy to be invested, and the interest paid

to her for her separate use for life, with remainder to her children absolutely, but with power to her to appoint a life interest to her husband. The daughter died unmarried: Held, that she took an absolute interest in the legacy.—*Mayer* v. *Townsend*, 3 B. 443.

2. (*Construction—Absolute interest—Gift over.*) The testator bequeathed a leasehold house and premises, with the furniture and plate, to his son, and added, "and should he die without heir or will, the profits of the said house to be equally divided between all my grandchildren, by the consent of his mother:" Held, that the son took an absolute interest in the house.—*Green* v. *Harvey*, H. 428.

3. (*Construction— Charge of debts and legacies.*) The will of a testator directed all his debts, funeral and testamentary expenses, and legacies thereby given, to be paid as soon as conveniently might be after his decease, and then followed, "And I charge my debts and legacies on my real and personal estate:" Held, that the charge on real estates extended to a legacy given by codicil in trust for A. for life, and that such construction was not cut down by his directing the stocks to be appropriated for payment of it *to return and become part of the residue of his personal estate.*—*Rooke* v. *Worrall*, S. 216.

4. (*Construction—Charge of legacies—Unattested codicils.*) Testator having by will, duly executed, charged upon his real estate the legacies *thereby* given, afterwards gave legacies by several unattested codicils, and finally executed a codicil duly executed and attested, varying the appointment of trustees and executors, and revoking some legacies given to them by some of the codicils: Held, that the legacies given by the unattested codicils were not charged upon the land.—*Radburn* v. *Jervis*, 3 B. 450.

5. (*Construction—Costs of investment.*) Under a direction by will to accumulate rents and profits of real and residuary personal estate, until the accumulations should amount to a certain sum, and then to invest the same in the purchase of real estate, to be settled on the uses and trusts declared thereof by the will, the costs of the investment must be paid out of the accumulations, and not out of the residue.—*Gwythen* v. *Allen*, H. 505.

6. (*Construction—Cumulative legacy.*) Testator having in his lifetime secured by bond an annuity of 300*l.* to A., to be paid at the usual quarter days, with a proviso against alienation, and that it should be settled on A.'s marriage, by will increased this annuity to 500*l.*, charging the whole on his land. Afterwards, by an unattested codicil, he directed his trustees to raise the annual sum of 500*l.*, and pay it to A. quarterly: Held, that this legacy was cumulative.—*Radburn* v. *Jervis*, 3 B. 450.

7. (*Construction—Demonstrative legacy.*) A testator devised his estate H. to trustees for sale, for payment of his debts and legacies, in exoneration of his personal estate; and after reciting that he became entitled on his marriage to a sum of 7,442*l.*, of which he had received 2,442*l.*, and the 5,000*l.* remained due, he bequeathed 2,442*l.* to be paid out of the produce of the estate H., and the sum of 5,000*l.*, when and if the same should be received and got in, but not otherwise, to A., B., C., and D., equally, and in case the 5,000*l.* should be received by him in his lifetime, he directed the same to be raised out of the estate H. The testator received the 5,000*l.*: Held, that the legacy was demonstrative, and that it was a charge upon the general personal estate as well as on the estate H.—*Colville* v. *Middleton*, 3 B. 570.

8. (*Construction—Devise for maintenance—Power of sale.*) A testator devised his real and personal estate to his wife absolutely, and at her own disposal, for the maintenance of herself and bringing-up of his children. Held, that she could sell the real estate.—*Wood* v. *Richardson*, 4 B. 174.

9. (*Construction—Exoneration—Legacy.*) Testator having charged his real estate with payment of *his debts*, expressly, in exoneration of his personal estate, afterwards gave two legacies, which he charged upon his real estate, and directed that, in a certain event, interest on those legacies should be paid out of the rents and profits of his real estates. Held, that the legacies were payable only out of the realty.—*Jones* v. *Bruce*, S. 221.

10. (*Construction—"Family"—Charitable uses—Perpetuity.*) Devise to a vicar and churchwardens, and their successors, together with certain other trustees, upon trust, to distribute certain rents and profits annually on a day named, among certain *families*, according to their circumstances, as in the opinion of the trustees they might need assistance, whose names were expressed to be thereinafter mentioned, viz. (naming twenty-four persons). Held, 1st., that the devise was not void as a devise for charitable purposes within the statute; 2nd, that as the word *family* would admit of a definite meaning, viz. to signify the persons named, the devise was not void for uncertainty. Held, 3rd, that as an immediate interest was given to objects in existence for their lives, as to these, at all events, the devise was not void as tending to a perpetuity.—*Liley* v. *Hey*, H. 580.

11. (*Construction—Gifts to executors—Residue.*) A testator, after reciting that his property consisted of a freehold house and messuages, directed the house to be sold, and gave legacies (among others) to G. and P. his executors, and concluded his will as follows: "To my friend G., who is likewise my executor, any sum then appearing after the contents of this my will are fully complied with and fulfilled." G. died the day after the testator, without having proved the will. Held, in a suit by his executors against the testator's heirs and next of kin, that the plaintiffs were entitled to the residue, including the proceeds of the house. *Semble*, the rule, that an executor, to entitle himself to a legacy, must prove the will, does not extend to a residue.—*Griffiths* v. *Prince*, S. 202.

12. (*Construction—Implication.*) The testator devised real and personal estate, after payment of debts on trust (subject to the dower and thirds at common law of his wife), to receive and apply the rents, issues, and profits thereof, or the overplus thereof, after deducting the dower and thirds of his said wife, and the interest of monies charged on his said real estate, for the maintenance of his children, and then on trust to sell and divide the monies amongst his children. The wife was not legally entitled to dower out of the estates devised. Held, that there was no gift by implication to the wife.—*Adams* v. *Adams*, H. 537.

13. (*Construction—Interest of trust fund.*) A testator bequeathed the residue of his personal estate to three trustees, in trust to pay, apply, and dispose of all the interest thereof for the maintenance, support, and benefit of his three children, and the survivors and survivor of them, in such shares and proportions, and in such manner as the trustees should think most proper and advisable; and if all the children should die without leaving issue, then to two of the trustees upon another trust. Held, that the whole income of the residue was given for the children's benefit, and part only having been so applied, the surplus devolved to the personal representative of the survivor.—*Beevor* v. *Partridge*, S. 229.

14. (*Construction—Joint or successive estates.*) A testator gave a sum of money in trust for his daughter, a married woman, so as not to be subject to the debts, acts, or control of her husband; and gave an equal sum to a second daughter (also married), "*in trust, as aforesaid, for the use of herself and children:*" Held, that the second daughter took an estate for her separate use for life, with remainder to her children.—*French* v. *French*, S. 257.

15. (*Construction—Legacy duty.*) A testator directed his executors to set apart a sum not more than 7500*l.*, the dividends of which, when invested as thereinafter mentioned, would amount to the *clear* yearly sum of 300*l.*, *clear of all deductions whatsoever*, and to invest the sum so to be set apart in government or other securities, and gave the annuity to the plaintiff for her life, and directed that if at any time the dividends of the trust named from any cause should prove deficient, the trustees should make good the deficiency out of the residue. Held, that the annuity was free of legacy duty.—*Morris* v. *Burton*, S. 161.

16. (*Construction—Per capita or per stirpes.*) Bequest "to A. and to the children of B., to be equally divided." Held, that they took *per capita*.—*Dowding* v. *Smith*, 3 B. 541.

17. (*Construction—Period of survivorship.*) Bequest of 500*l.* to A., and in case of her death, either before or after the testator, to devolve to her child or children; or in the event of their being also dead, at her decease to B. There were three children, one of whom only survived. Held, that he was entitled to the whole fund.—*Currie* v. *Gould*, 4 B. 117.

18. (*Construction—Power of distribution.*) *Quære*, whether a power to appoint among children in such shares and proportions as donee should think fit may be exercised by an exclusive appointment to one child, such one child also being the only survivor of the objects of the power.—*Woodcock* v. *Renneck*, 4 B. 190.

19. (*Construction—Residue—Lapse.*) A testator devised and bequeathed his real and personal estate, in trust to sell, and constituted a mixed and blended fund. He thereout gave J. B. 100*l.* and one-eighteenth of the residue, and he gave the remaining portions of the residue to other persons. J. B. died in the testator's lifetime: Held, that the next of kin and heir were entitled to their proportionate part of the lapsed share of the residue, and that the legacy of 100*l.* fell into the residue and passed by the gift thereof.—*Salt* v. *Chattaway*, 3 B. 576.

20. (*Construction—Residue, special or general.*) A testator bequeathed to A. his household furniture and other like things, "and all other goods of whatever kind," and he appointed that certain specified monies should be divided as follows, after all his debts should be paid off. He then specified certain legacies, and proceeded, "three or four thousand pounds, or whatever remaining sum or sums to A.:" Held, that A. did not take the general residue.—*Wrench* v. *Jutting*, 3 B. 521.

21. (*Construction—Survivorship of annuity.*) Bequest "to A. and B. of the sum of 25*l.* per annum each, for and during the term of their natural lives or the life of the longest liver of them, for their or her own absolute use and benefit:" Held, that on the death of A. her annuity survived to B. for her life.—*Hatton* v. *Finch*, 4 B. 186.

22. (*Construction—Trust—Maintenance.*) The testator directed that all his property should be at the disposal of his wife, for herself and her children: Held,

that the children took an interest in possession in the property of the testator at his decease, and the order made was, that the mother, maintaining and educating the children in a proper manner, the whole of the income of the residuary estate should be paid to her during the infancy of the children, or until further order, with liberty to her and her children to apply.—*Crockett* v. *Crockett*, H. 451.

23. (*Construction—Trust.*) Under a bequest of residue to wife of testator to the intent that she might dispose of the same for the benefit of herself and their children in such manner as she might deem most advantageous, the Court inclined to think that the wife did not take an absolute interest, but refused to make a declaration till the usual accounts in an administration suit had been taken.—*Raikes* v. *Ward*, H. 445.

24. (*Construction—Vesting—Maintenance, without interest, and beyond twenty-one.*) A party whose interest in a fund had not vested, held under the terms of a power in a will, entitled to maintenance, even after attaining twenty-one.—*Ellis* v. *Maxwell*, 3 B. 587.

25. (*Construction—Vesting—Survivorship.*) Bequest to trustees to pay the dividends to A. and B. his wife during their lives, and the life of the survivor; and after their decease, in trust to transfer and pay over unto their children, in such shares and proportions as the survivor of A. and B. should by will appoint: Held, that the objects of the power and of the gift were the children living at the death of the surviving parent; and therefore that the representative of a child who died in the life of A. had no interest in the fund.—*Woodcock* v. *Renneck*, 4 B. 190.

26. (*Legacy to trustee as such—Substituted trustee.*) A testator appointed A. B. and C. D. trustees and executors of his will. By a codicil, he bequeathed to each of the trustees named in his will the sum of 5000*l.* on condition that he accepted the trusts thereof. By a subsequent codicil, he revoked all that part of his will which related to C. D., and requested E. F. "to undertake and fulfil the same purposes and intentions, and on the same conditions, for the effecting of which he had appointed the said C. D. By a subsequent codicil he revoked the appointment of A. B. and C. D. as trustees and executors, and all legacies to them, and he nominated E. F. executor and trustee thereof: Held, that E. F. was entitled to the legacy of 5000*l.*—*Radburn* v. *Jervis*, 3 B. 450.

27. (*Probate—Foreign will—Copy.*) A will proved abroad and retained there, established on production of a copy certified under the hand and seal of the proper officer, &c., which had been admitted to probate in the Ecclesiastical Court here.—*Pullen* v. *Rawlings*, 4 B. 142. See also Gardner v. Myre, Bayley v. Bayley, Ellis v. Medlicott, Harrison v. Weale, reported in note.

28. (*Revocation—Partial effect of unattested codicil.*) A testator, by will duly attested, gave all his real and personal estate to trustees, to convert into money and pay his debts, and then to appropriate and take out of his said trust monies 1000*l.* which he gave to the plaintiff. By a codicil not properly attested so as to pass real estate, he revoked the legacy: Held, that the revocation was inoperative as regarded the real estate, and that the plaintiff was entitled in the proportion which the real estate bore to the personal.—*Stocker* v. *Harbin*, 3 B. 479.

And see MARRIED WOMAN.

HOUSE OF LORDS.

[Containing cases in Clark & Finnelly, vol. 7, part 5, and vol. 8, part 1, omitting cases noticed in former digests.]

COMPOUND INTEREST.

(*Mutual accounts.*) Compound interest is only allowed by the English law in cases of mutual accounts, and in virtue of a contract expressed or implied; accordingly in a suit by the representatives of the creditor of a firm, to recover a sum of money due to the creditor at his death upon an account current, although compound interest had been given between them up to that time, it was refused on the balance since that time, as the mutuality of the account and the possibility of a contract then ceased.—*Ferguson* v. *Fyffe*, viii. 121.

CORPORATION,

(*Constitution—Privilege—Surgery and medicine—University.*) The University of *Glasgow* possessed from an ancient date the power of conferring degrees in arts and sciences, and particularly the degree of doctor or master in all such arts and sciences as should be taught at the university. It had long exercised the power of conferring degrees in medicine. In 1599 King James VI. granted a charter to "Mr. Peter Law, our surgeon, and Mr. Robert Hamilton, professors of medicine, and their successors, indwellers in Glasgow," by which "they and their successors" were authorised to summon before them, within certain bounds therein mentioned, "all persons professing or using the art of surgery, and to examine them on their literature, knowledge and practice," and to admit them, &c. or to reject them; and in case they should be contumacious, to impose a certain penalty on them. This grant was in terms ratified by a Scotch Act of Parliament, in 1672. The grantees assumed the name of the Faculty of Physicians and Surgeons of Glasgow, and from the date of the grant exercised a supervision over persons practising surgery within the specified bounds. In 1817 the university founded a professorship of surgery, and then, as surgery was one of the arts and sciences taught at the university, conferred degrees in surgery as well as in medicine. The faculty claimed to exercise its rights over the persons holding these degrees, if practitioners within the bounds: Held, that the faculty was a corporation, and had a right to this supervision; that the granting by the university of degrees in surgery to persons who practised within the bounds would not exempt them from the supervision of the faculty; and that the power given to the faculty by the charter to impose a penalty on the contumacious, did not prevent that body from proceeding against them in a court of law.—*University of Glasgow* v. *Faculty of Surgeons*, vii. 958.

DOMICILE.

1. (*Administration.*) Although the succession to personal estate is governed by the law of the country where the deceased had his domicile, the administration

of that estate should be by the law of the country where it is situate; accordingly where on the refusal of trustees and executors of a Scotch will to act, administration to the personalty in England had been taken out by the next of kin, and new trustees were afterwards appointed; it was held on appeal, reversing the judgment of the Court of Session, that such trustees had no right to call upon the next of kin to transfer to them the personal estate received under the administration.—*Preston* v. *Lord Melville*, viii. 16.

2. (*Residence—Intention.*) In order to obliterate the domicile of origin, there must not only be continued residence in another country, but an intention to make it permanent, and to abandon the former domicile. Accordingly a Scotchman who had taken the lease of a house and formed an establishment in England and resided there for seven or eight years, but during that time frequently expressed his intention to return to his dwelling in Scotland, and occasionally given orders for preparations to be made there in contemplation of his return, was held to have been domiciled in Scotland during the period of his stay in England.—*Munro* v. *Munro*, vii. 842.

LANDLORD AND TENANT.

(*Scotch Law—Sequestration—Offer of payment by third party.*) Where a Scotch landlord had obtained a sequestration of the tenant's crop and stock for arrears of rent, and a party who was the agent of the tenant offered to advance the arrears and expenses upon having an assignment of the sequestration: Held, reversing the judgment of the Court of Session, that the landlord was not bound to withdraw the sequestration upon such offer being made, and was not liable in damages to his tenant for his delay in accepting it.—*Gordon* v. *Graham*, viii. 107.

PARTNERSHIP.

(*Liability of retiring partner.*) A partner who had joined a firm before 1810 and continued in it up to 1820, held liable in 1835 to a suit by the representative of a creditor, for money due to him by the firm in 1810, and interest on it up to the institution of the suit.—*Ferguson* v. *Fyffe*, viii. 121.

SETTLEMENT.

1. (*Construction—Power.*) A power given to wife by a postnuptial Scotch deed to raise a fund and dispose of it as she thought fit in certain events that happened, held to be equivalent to and absolute gift of the fund to her.—*Dill* v. *Earl of Haddington*, viii. 168.

2. (*Rule of construction.*) When there is in an instrument a clear and distinct expression of intention respecting the disposal of a fund, applicable to events that have happened, those terms of gift are not to be superseded by ambiguous expressions respecting the same fund, but having reference to other events which have not occurred.—*S. C.*

SCOTCH MARRIAGE.

1. (*Birth and marriage out of Scotland.*) That rule of the Scotch law, according to which the children of Scotch parents born before marriage, of parties competent to marry, are rendered legitimate by the subsequent marriage of their parents, applies to a case where both the birth and the marriage are out of Scotland.—*Countess of Dalhousie* v. *M'Douall*, vii. 817.

2. (*Same point.*) Same point decided the same way, where there was also the additional circumstance of the mother being an English woman.—*Munro* v. *Munro*, vii. 842.

SCOTCH TRUST.

1. (*Appointment of trustees—Jurisdiction of Court of Session.*) *Quære*, whether the Court of Session has the power of appointing trustees where the trustees appointed by the author of the trust disposition decline to act.—*Preston* v. *Melville*, viii. 16.

2. (*Legal seisin.*) A trust disposition and deed of settlement conveyed generally the testator's whole heritage to trustees, containing no precept of sasine, but surrogating the trustees in place of the truster, and binding him and his heirs to complete titles, and convey to the trustees; he reserving to himself power to execute entails of parts of his fee-simple lands, but declaring them to be suspended during the continuance of the trust, except as to rights of patronage; and he executed such entails with precepts of sasine. After his death, the trustees named in the deed having declined to accept the trust, the first heiress of entail made titles, and was duly infeft heiress of entail. Trustees were afterwards appointed by the Court, with her consent, and with all the powers given to those who declined to act, raised an action of constitution and declarator against the heiress of line, and called the heiress of entail as defender: Held, by the Lords (affirming the decree of the Court of Session), that it was not competent for the heiress of entail to oppose the completion of feudal titles, by the trustees, to the whole of the lands comprised in the trust disposition; and that they (provided they were duly appointed) were entitled to a conveyance of the whole lands, according to the intent of the trust disposition, but without prejudice to the rights of any party.—*Preston* v. *Viscount Melville*, viii. 16.

WILL.

(*Construction—Annuities—Arrears—Residue.*) A testator gave his whole estate to trustees to sell, and, after payment of debts, expenses, and certain legacies, to pay out of the residue two annuities of 400*l.* each to F. and P., and one of 200*l.* to B., for their respective lives. And for the better fulfilment of that purpose, he directed them to vest sufficient capital sums on securities; and if the residue should not be sufficient, to vest whatever residue there was, and pay the dividends to the annuitants in the same proportions; and if more than sufficient, to vest the surplus, and divide it and the capital sums set apart for the annuities, as the same should become tangible by the death of each annuitant, among residuary legatees. B. pre-deceased the testator. The residue did not yield sufficient income every year to pay F. and P. 400*l.* each. On F.'s death, P. and F.'s personal representatives claimed payment of all the arrears out of the then enlarged income of the residue: Held, by the Lords, (varying interlocutors of the Court below), that F. and P. were entitled to payment of 400*l.* each only in those years in which the income of the residue was sufficient; that when in any year that income was more than sufficient, the excess belonged to the residuary legatees; and on F.'s death half the capital of the residue became divisible among them, and then P. became entitled to the income in each year of the other half; but when in any year the income exceeded 400*l.*, the excess belonged to the residuary legatees, and neither P. nor F.'s representatives were entitled to any payment of arrears.

No benefit accrued to the residuary legatees from the lapse of the annuity to B. except when thereby the income of the residue exceeded the amount of the two subsisting annuities.—*Casamaijor* v. *Pearson*, viii. 69.

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EVENTS OF THE QUARTER.

The Bills to which the profession look with most interest are the Local Courts Bill promised by the Lord Chancellor, and the Registration of Voters Bill introduced by Sir James Graham. We have already fully discussed the one, and shall suspend our judgment on the other till it is brought in, for there is little chance of its passing till the end of the session, if at all. We believe it to be quite possible to establish a set of tribunals capable of answering the immediate purpose, without materially affecting the principle of centralization which forms the basis of our law; but it may well be doubted whether the sittings of the proposed judges can be arranged in such a manner as to leave them at liberty to practise in the superior Courts at Westminster.

A numerous body of practitioners are at present dissatisfied with the Lord Chancellor on account of the new fees in equity. They complain, with some show of reason, that their wishes were not consulted nor their opinions taken, and it seems not improbable that the subject will be revived by some of these malcontents in the course of the session.

The new Bankruptcy Courts have given satisfaction on the whole, though considerable inconvenience has been occasioned in peculiar instances by the distance parties have to travel in order to take out a fiat—for example, from Falmouth to Exeter—though this is an extreme case, as it would be difficult to select another district so poor in railroads.

The circuits have become so unequal in point of business that it is quite clear a new division must take place; and the arrangement for the next assizes, which allots three judges to the Northern, is quite decisive as to the fate of that circuit, notwithstanding the vehement protest put in by the author of "Observations on the proposed Dismemberment," &c. who calls on the Government to wait and see what effect the Local Courts Bill will have on the cause lists for Yorkshire and Lancashire, forgetting that this is a general measure which will not affect the ratio. One candid admission strikes us as fatal to his argument:—

"Is then, the division of the Northern Circuit inevitable? In deciding this question we must consider, on the one hand, that the circuit has each year become more burdensome in the amount of business; that it now lasts two months,—not two months of that gentlemanly kind of work from ten to four or five that the business of term at Westminster would prepare us for, but good honest, downright, mind-fatiguing, body-breaking work, from nine in the morning till late in the evening; work such as knocks up the health of all in business or out of business, judges as well as counsel, as much as it wearies and overworks them in mind. These are facts which none of us can dispute, and if there were no prospect of a change in our present legal arrangements, I fear we could not with reason expect such a state of things to be continued."

Add to this the enormous expense which a prolonged assize entails on litigants, and as strong a case for a fresh arrangement of a permanent character will be made

out as it is well possible to conceive, nor would it be difficult to show that the bulk of the profession will be benefited as well as the public. The author says,—

"It is believed, upon very good authority, that the alteration that will in fact be made, if any be carried into effect, will be to add the Midland Circuit, which is to give its Southern County to the Norfolk Circuit, to the county of York, thus leaving the other four counties still to form the Northern Circuit, and creating a new circuit, which will, of course, be called after its predecessor, the Railway, 'The York and North Midland.' This, it is said, will be 'the cheapest' alteration, as it will not require the creation of new judges. Is this a good reason or not?"

In our opinion, a very good reason. Every addition to the number of the judges is in the long run so much deducted from the authority of the bench, and undoubtedly the entire circuit business of England and Wales might be disposed of by fourteen judges, when properly mapped out.

With regard to London business, particularly that in banc, it will be time to talk of new judges when the judges of the Court of Common Pleas shall have been compelled to put their shoulders to the wheel. At present it is as much as they can do to keep up a show of business: on several days during the present term they have not sat an hour; and the anomaly of the coif is daily becoming more glaring. Far better had it been to place it and justify it on the footing of a monopoly, than hold it out as open to all members of the profession of fair character and seven years standing, so long as a high prescriptive rank is attached to it. When it became a rule that none but a serjeant could officiate as a judge at nisi prius, serjeants were in point of fact the leading lawyers of their day. Are they now? or will they be five years hence?

The rank of Queen's counsel has also become too common, and we understand that more than a dozen fresh applications for it have been made within the month. It is one of the most delicate and difficult of the Chancellor's duties to decide on applications of this sort; because, in many instances, he has no admitted criterion to depend upon. It is neither amount of business, nor standing or reputation apart from business, that ought to constitute a claim, but a qualification compounded of the three; and it should never be forgotten that the distinction is still a very enviable one, and that the manner in which it is bestowed not merely affects the prospects of the candidate and his contemporaries, but the character and constitution of the bar. It is a remarkable fact that Lord Abinger did not receive a silk gown till he had been more than twenty-four years at the bar.

Jan. 27.

Errata.—P. 107, the quotation should be read as one line.
P. 167, l. 29, read *Clarke Fynmore and Fladgate.*

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THE LAW MAGAZINE.

ART. I.—MARRIAGE, LEGITIMATION, AND DIVORCE.

It requires no flourish of trumpets to introduce the laws of marriage, legitimation, and divorce to the notice of our readers, since every one must acknowledge that these laws most essentially affect the best interests of society. In contemplating this subject, the observer cannot fail to remark the startling differences which exist between the institutions of Scotland and those of England. It will be our endeavour, in the present article, to point out those differences, pausing, as we proceed, to make such comments as naturally occur. Our object is to suggest, if possible, some means of assimilating the laws of the sister countries.

The legislature of England, well knowing that marriage is the most important of all human contracts, has wisely thrown some restraint upon the contracting parties, in order to protect them against improvident haste on the one hand, or fraudulent design on the other. With this view all English marriages, solemnized with religious rights, are void, if the parties wilfully intermarry before banns have been published or a licence obtained, or wilfully consent to the ceremony being performed, either by any person not in holy orders, or (unless a special licence has been granted by the Archbishop of Canterbury) in any other place than a church or licensed chapel.[1] If banns are published, they must be published three Sundays in the church or chapel of the parish wherein each of the parties dwells, or, under certain circumstances, of the adjoining parish;[2] the marriage must be solemnized within three months of the complete publication,[3] and in one of those

[1] 4 Geo. 4, c. 76, s. 22. [2] Sects. 12, 13. [3] Sect. 9.

churches or chapels,[1] the curate of the other certifying that the banns have been duly published in his parish;[2] and if either of the parties is a minor, who has never before been married, the parent or guardian may refuse his consent.[3] If a licence is obtained, it can only be granted on the oath of one of the parties that no impediment exists, and that either the man or woman has resided for the last fifteen days within the parish where the ceremony is to be performed, and, in the case of minors not before married, either that the parents or guardians give their consent, or that there are no persons authorized to do so.[4]

In the case of English marriages which are celebrated without the sanction of religion, one of the parties must give notice of the intended marriage to the superintendent registrars of the districts, wherein each has dwelt "for not less than seven days then next preceding," and such notice must state the names, professions, and residences of both, and the building in which they are to be married.[5] This notice must be entered by the registrar in a book for public inspection,[6] and, unless the marriage is to be solemnized by licence, must be thrice read within twenty-one days of the date of entry at the meetings of the guardians of the poor,[7] or, in the event of there being no guardians, it must be openly suspended for that period in the registrar's office.[8] The registrar shall then, unless forbidden by some authorized person, issue a certificate, on the production of which to the officiating minister, the ceremony may be performed.[9] If a licence is granted, this certificate will be issued at the expiration of seven days from the date of the entry of the notice.[10] The licence may be granted by the registrar,[11] on an oath or affirmation of one of the parties similar to that required on the granting of licences under 4 Geo. IV. c. 76,[12] and the same consent is requisite under both acts.[13] The marriage must in all cases be solemnized within three months from the date of the entry

[1] 4 Geo. 4, c. 76, s. 2. [2] Ib., et Rub. [3] Sect. 8. [4] Sect. 14.
[5] 6 & 7 Will. 4, c. 85, s. 4; and 3 & 4 Vict. c. 72, Sched.
[6] 6 & 7 Will. 4, c. 85, s. 5. [7] Sect. 6.
[8] 7 Will. 4 & 1 Vict. c. 22, s. 24.
[9] 6 & 7 Will. 4, c. 85, ss. 1, 7, and 16. [10] Sect. 7.
[11] Sect. 11. [12] Sect. 12. [13] Sect. 10.

of the original notice;[1] and if the parties wilfully intermarry in any other place than a church, chapel, or registered building,[2] or without due notice to the registrar, or without certificate duly issued, or without licence, if a licence is necessary, or in the absence of a registrar, when his presence is requisite, the marriage is void.[3] Under both acts the ceremony must be performed in the presence of two witnesses,[4] and, in order to secure sobriety, between the hours of eight and twelve in the forenoon.[5] Under the act of George the Fourth, if the minister be convicted of wilfully neglecting this last-mentioned rule, he must, unless pardoned, be transported for fourteen years.

The want of consent in the case of minors, does not, under either act, invalidate the marriage,[6] but the guilty party, through whose fraud the publication of banns, the licence, or the certificate, has been unduly procured, forfeits all the property accruing therefrom;[7] and the minister, who knowingly performs the ceremony without due consent, is liable to severe punishment. In no case can the validity of the marriage be questioned, by showing that the parties did not reside in the places where the banns were published, the licence granted, or the certificate issued.[8]

Such is a general outline of the provisions of the English marriage laws, and even on the most cursory examination it is clear, that they are insufficient for the purposes they profess to have in view. To say that when minors intermarry, the consent of parents or guardians is required by law, but that the absence of such consent does not invalidate the marriage,

[1] 6 & 7 Will. 4, c. 85, s. 15.

[2] The number of buildings registered in England for the solemnization of marriages, under the act of Will. 4, is 1922, and the number of marriages celebrated in such buildings during the year ending June 30, 1841, was 5816. During the same period 2036 couples were married in the superintendent registrar's office. See Fourth Report of Registrar, p. 17.

[3] Sect. 42.

[4] 4 Geo. 4, c. 76, s. 28; and 6 & 7 Will. 4, c. 85, s. 20.

[5] 4 Geo. 4, c. 76, s. 21; and 6 & 7 Will. 4, c. 85, s. 20.

[6] 4 Geo. 4, c. 76, s. 16; 6 & 7 Will. 4, c. 85, ss. 10, 25; Rex v. Birmingham, 8 B. & Cr. 29.

[7] 4 Geo. 4, c. 76, s. 23; 6 & 7 Will. 4, c. 85, s. 43; and Attorney-General v. Mullay, 4 Russ. 329.

[8] 4 Geo. 4, c. 76, s. 26; and 6 & 7 Will. 4, c. 85, s. 25.

sounds very like a contradiction of terms. By Lord Hardwicke's Act all marriages of minors by licence, without consent, were absolutely void;[1] and we cannot help thinking that the legislature has acted most injudiciously by not adopting, in the subsequent acts of Geo. IV. and Will. IV., the language there employed. Surely it is not unreasonable to declare that parties, who, till they attain the age of twenty-one, are incompetent to make a will, to sell or mortgage a single field, or to bind themselves or their property by the most paltry pecuniary agreement, shall not heedlessly, but irreversibly, enter into a contract, which, for weal or woe, must tincture the whole current of their future lives, without first obtaining the consent of those, who are alike led by affection, and enabled by experience, to form the soundest judgment respecting the union proposed. It is true that, in a worldly age, parents may be found, who will perhaps unjustly and selfishly refuse compliance with the reasonable wishes of their children; but even in these cases the disappointed lovers are not left without hope. Let their affections continue unchanged for a very few years, in most cases for a few months, and they require the sanction of no human being, but may determine the matter for themselves. There is a vast distinction between enabling the parent to say, "This marriage will be productive of misery; you are young and inexperienced; wait till you are of age, and then decide:"—and permitting him to exclaim with Sir Anthony Absolute, "Zounds, sirrah! the lady shall be as ugly as I choose. She shall have a skin like a mummy, and the beard of a Jew; but if you do not agree, without condition, to marry her, I'll disown you, I'll disinherit you, I'll unget you, and, d—n me, if ever I call you Jack again!"

We should also remember that among the continental nations parental restraint upon the marriages of minors exists to a great extent. In Germany such marriages without the consent of parents, or at least of fathers, are absolutely void.[2] A similar usage prevails in Holland;[3] and in France the law is thus declared by the Code Civil:[4]—"Le fils qui n'a pas

[1] 26 Geo. 2, c. 33, s. 11.

[2] Heineccius, Elem. Jur. Ger. lib. i. s. 138; Sto. Conf. Laws, § 90.

[3] Van Leuwen's Com. on the Roman Dutch Law, p. 73, Sto. id.; and Ruding v. Smith, 2 Hagg. Consist. R. 372, 379.

[4] Code Civil, Art. 148—150.

atteint l'âge de vingt-cinq ans accomplis, la fille qui n'a pas atteint l'âge de vingt-un ans accomplis, ne peuvent contracter mariage sans le consentement de leurs père et mère: en cas de dissentiment, le consentement du père suffit." Monsieur Rogron, in commenting on this provision, observes, "Les forces du corps se développent avant les facultés de l'âme; l'homme se trouve ainsi habile à contracter mariage avant d'être capable de faire un bon choix. La loi a voulu que la tendresse éclairée des parents suppléât au défaut d'expérience des enfans, et s'opposât à l'entraînement des passions." So also in Ireland, all marriages, where either party is under age, contracted without the written consent of the father, guardian, or Lord Chancellor, are void, provided the minor be entitled either to 100*l.* per annum of real estate, or to 500*l.* of personal estate; or if the father or mother be in possession of 100*l.* a-year realty, or of 2000*l.* personalty. And *in all cases* the marriage of a minor without such consent may be disannulled, if the father, &c. within a year from the ceremony, commences a suit for that purpose in the Ecclesiastical Court.[1]

The classical reader will recollect, that the incapacity of minors, or rather of unemancipated children, to marry without the consent of their parents, was carried to a very great extent among the ancient Greeks[2] and Romans;[3] while those acquainted with the Jewish polity will discover among the laws of that singular people remarkable traces of similar disabilities.[4]

It deserves, indeed, to be well considered, whether it may not be expedient to reduce the age of minority in the case of women, since it is notorious that their forms and minds are alike more rapidly developed than those of the opposite sex. A man at nineteen, whatever undergraduates may think, is seldom more than a tall boy; but a woman of that age has been one year, or perhaps two years, "in the world," and is usually as competent to form a correct opinion as she is at any future period of her life. With this reduction of the age of minority, we anxiously wish that in all marriages of minors

[1] 9 Geo. 2, c. 11, ss. 1, 2, 3, Ir., explained and amended by 23 Geo. 2, c. 10, Ir.
[2] Potter's Gr. Ant. vol. ii. pp. 266, 267.
[3] 1 Inst. 10; Pr. Taylor's Elem. of Civil Law, 310—313.
[4] Compare Exod. ch. 22, v. 17; 1 Cor. ch. 7, v. 36—38; and Deut. ch. 7, v. 3.

the consent of their parents or guardians might be made a condition precedent to the validity of the contract.[1]

With respect to the publication of banns an alteration might be made, with which few persons would probably quarrel. In addition to reading out the names during divine service, a list should weekly be made, containing at full length the names, professions, and residences of the aspirants to marriage, and this list should be affixed to the church door, or to some other convenient public place. Notice would thus be given to all persons interested, though they might unavoidably be absent from the church, and this alteration would be of peculiar advantage in all large towns where, in consequence of the number of publications made every Sunday, the reading of the names naturally attracts little attention. Sir George Head tells us, in his amusing tour through the manufacturing districts, that at the Old Church in Manchester nearly two hundred banns are sometimes published consecutively.[2] Is it possible to contend that such a collective publication can serve any valid purpose, by affording notice of an intended marriage?

Turning now to the Scotch law, a system presents itself to our notice, which, however extensively it may have prevailed among the nations of Europe during the darkness of the middle ages, is truly remarkable, when found to exist unmodified in the nineteenth century among a civilized community. We speak not here of regular marriages, which, in Scotland, as in England, are preceded by the proclamation of banns,

[1] We borrow from the Fourth Report of the Registrar General the following table of English marriages registered during the three years ending June 30th, 1841; by which it will appear that the men who marry under age, are to those of full age, nearly as 5 to 95; the women as 14 to 86.

Total married.	Under age.	Proportion per cent. to the whole number married, of persons marrying under age.
367,894 couples, Or, 735,788 persons.	17,266 men. 50,714 women.	4·69 men. 13·78 women. } Mean 9·23.
	Total 67,980	

[2] "I attended the Old Church at Manchester * *. I had heard on the preceding Sunday the banns proclaimed as follows:—For the first time of asking, sixty-five; for the second time, seventy-two; for the third time, sixty:—total one hundred and ninety-seven."—*Head's Tour*, p. 70.

and are celebrated by a minister of the kirk with the solemnities of religion; but we allude to private marriages which are equally binding for all purposes, and are contemplated by the law, if Lord Stowell is an authority, with as much countenance and favour as the most public can be. "They appear to create no scandal: to give no offence. The parties are not reprobated by public opinion, nor is legal censure actually applied.[1]" To give validity to such marriages, no notice, no celebrator, no ceremony, not even subsequent consummation, is required; but a simple declaration of mutual and immediate consent, whether oral or written, or however expressed, constitutes "very matrimony," from the moment of acquiescence.[2] Could the most subtle mind imagine a scheme better calculated, either to encourage perjury or to render the legal union of the sexes insecure, than this, which enables a spiteful or interested witness, by trumping up a story little open to contradiction, to establish a marriage that never existed, and which at best leaves the legality of the really valid contract, to be doubtfully gathered from the loose recollections of a loose verbal declaration? The best, and indeed the only way of avoiding these insuperable difficulties, is at once to declare clandestine marriages absolutely void, and to establish the necessity of resorting to a public and regular form, followed by a public and regular registration, without which the relation of husband and wife cannot be contracted.

A remarkable illustration of the evils of the Scotch law was afforded by the case of Walker v. M'Adam, decided by the House of Lords in 1813.[3] The circumstances were these: M'Adam, in 1795, took into keeping Elizabeth Walker, and had children by her. In 1805, in the presence of *some of his servants*, he declared her his wife. She gave her hand and curtsied, but said nothing. No consummation followed, and on the same day M'Adam committed suicide. Their

[1] Dalrymple v. Dalrymple, 2 Hagg. 72. We have not ventured in the text to dispute the correctness of this language, but we have reason to believe that "the great civilian" was wrong in asserting that clandestine marriages created no scandal in Scotland. Indeed, by positive statute, 1661, c. 34, the contracting parties are liable to imprisonment and fine, and the celebrators to banishment for life; and several convictions in cases of this kind have of late years taken place. 2 Hume, 461, 463; Alison's Crim. Law of Scotland, vol. i. p. 547.

[2] St. Inst. 24, et seq.; Erak. Inst. 117, et seq.

[3] 1 Dow. 148.

lordships held that the marriage was valid, and the children legitimate. Can we be surprised that a learned commentator, in discussing this absurd law, should think it necessary to declare "that the consent must be real, and that words uttered in *jest* are not obligatory?[1]" since a student, who should find such a law prevailing among a people, might well be excused for doubting what limit to folly they were prepared to recognize. But this is not all. A boy of fourteen may thus irrevocably marry a girl of twelve, and that too in direct opposition to the distinct commands of the parents of both children. "This duty of consulting parents on so important an article," says Mr. Erskine in his valuable Institutes,[2] "is one of those which our legislature hath not thought fit to enforce, either by annulling the undutiful act, or *by inflicting any penalty on the actor*, though the marriage should be entered into even against the express remonstrances of the father." And in another place he indignantly observes, "If the law declares a pupil incapable of entering into the most trifling contract, from a defect of judgment, it surely ought not to suffer him to engage in an indissoluble society, of the nature of which he cannot form the smallest notion.[3]"

In saying that the law inflicts no penalty on the disobedient son, Mr. Erskine forgets that most grievous one, of leaving him for life to the fatal consequences of his undutiful conduct. The combined cruelty and folly of this monstrous law are so apparent, that on one occasion the judges of the Court of Session refused to comply with its provisions. The case, as reported in Mr. Morison's Compilation of Scotch Decisions, was as follows.[4] A girl, just twelve, with a considerable fortune, was going with her mother to Edinburgh. On their way, at an hotel in Leith, they met Mr. Cameron and his son, and there, without previous concert, while the mother was accidentally out of the room, the ceremony was performed. On her return, she instantly declared her dissent, and "a squabble ensued." The marriage was annulled; but the learned reporter observes, "The Court, moved with indignation at so gross a fraud, gave the judgment upon sentiment,

[1] Note by Brodie to Stair's Inst. p. 27.
[2] Page 122. See also St. Inst. p. 24; and Brodie's note, id. p. 28.
[3] Page 118. [4] Cameron v. Malcolm, Mori. Decis. of Sess. 12, 680.

rather than upon principle;" and Mr. Brodie, in his notes on Lord Stair's Institutes, commends this observation of the reporter, and adds, "As a matter of abstract justice the judgment was right, but not on legal principle."[1]

Can any additional observations be required to establish the necessity of abrogating this law? The only possible arguments in its favour which ingenuity can invent, are, that the law is venerable from its antiquity, and national from its peculiarity,[2] and that the people of the North are a proud people, who cannot readily brook any amendments adopted from the legal systems of the South. But surely age should not consecrate abuse, singularity is no index of wisdom, and pride, which rejects manifest improvement, becomes an object of contempt. If the Scotch are proud, they are also enlightened; and we will not believe, till the attempt has been made and has signally failed, that any mistaken feeling of public honour, or independence, would obstruct the introduction of a change, the advantages of which must at once be apparent to the meanest understanding. Did such a feeling prevail to any great extent in Scotland, would it not, of necessity, have been called into play in 1815,[3] when the entire system of her legal practice was materially altered, by the adoption in civil causes of the English trial by jury?

Be this as it may, a session should not pass, without at least confining the evils of the Scotch law to the Scotch people, and declaring that in future all runaway Scotch marriages contracted by English subjects shall be absolutely void.[4] The impolicy of enacting a law, and then permitting it to be evaded with im-

[1] Brodie's note to Stair's Inst. 28.

[2] Since the above observations were written the case of Reg. v. Millis has been argued before the House of Lords, the question being, whether, by *the common law* of England and Ireland, marriages per verba de præsenti, without the interference of a minister of the established church, are valid. We rejoice that this question has arisen, as, whatever the decision may be, it cannot fail to draw the attention of the legislature to the subject, and by rendering its interference, with reference to the nuptial contract in Ireland, absolutely indispensable, it will afford a favourable opportunity for the introduction of an act, embodying one general systematic law of marriage for all parts of the United Kingdom.

[3] 55 Geo. 3, c. 42.

[4] A letter has lately appeared in the leading journals, purporting to be written by Robert Elliott, the Gretna Green parson, in which the writer asserts, that from 1811 to 1839 he has married 7744 persons. See *The Times* of Feb. 23d.

punity, must be acknowledged by all; and Lord Brougham uses language only too well justified by the occasion, when he speaks[1] of "the present most absurd, and indeed disgraceful anomaly, of having the law framed in England so as to make the neighbourhood of Scotland open a door for escaping its enactments, whenever there are pecuniary means within the reach of the parties to the evasion." "We have at least a right to require," adds his lordship, "that if the Scotch must still marry in their present way, their custom or their law of marriage shall be confined to themselves, and not permitted to frustrate our English law of marriage in its most important enactments." It is no part of our duty to question the soundness of those decisions, which since 1769 have established the validity of such marriages.[2] On the technical construction of our marriage acts they were probably correct, but on the broad principles of international law, it is not too much to assert that they are at least opposed to the considered opinions of some of the greatest jurists who have ever lived. Not to mention Lord Mansfield, who, in Robinson v. Bland,[3] expressed rather a doubt than an opinion on the subject, we need only refer to the great names of Huber,[4] Bouhier,[5] Paul Voet,[6] John Voet,[7] and Pothier,[8] who do not hesitate to pronounce such marriages invalid, on the enlightened principle that an act done designedly in fraud or evasion of the law, by a mere change of locality, is utterly void.

It is idle to support the existing system, as too many men seem inclined to do, by alluding to the youthful indiscretions of some persons of exalted rank, and then triumphantly asserting that Gretna Green marriages are not always productive of misery. No one ever supposed that they were; but it is a little too much to contend, because such unions have occasionally resulted in happiness, that therefore the

[1] Speeches, vol. iii. 440.

[2] Compton v. Bearcroft, cited in Bull. N. P. 114; in Harford v. Morris, 2 Hagg. 429, 430; and in Middleton v. Jansenin, id. 443, 444. See also Story, Confl. of Laws, § 123 a, note (2).

[3] 2 Burr. 1077—1080.

[4] Huberus, lib. i. tit. 3, §§ 8 and 9.

[5] Bouhier, Cout. de Bourg. c. 28, § 61, p. 557.

[6] P. Voet. de Stat. § 9, c. 2, p. 268, ed. 1715; id. p. 323, 324, ed. 1661.

[7] J. Voet. ad Pand. lib. 23, tit. 2, § 4, tom. ii. p. 20.

[8] Pothier, Traité du Marriage, n. 263.

legislature should sanction their continuance. Instances might be furnished, and those too by "sitters in high places," of marriages not altogether wretched, though the ladies, without being widows, have brought no "virgin honours to the bridal bed," but neither truth, decency, nor morality, would be much promoted by citing such judicial authorities. The legislature must contemplate, not accidental, but general results; and it will do so to very little purpose, and will moreover pay but a poor compliment to female virtue, if it allows Scotland any longer to constitute the supposed safety-valve of English passion.

If we have hitherto condemned the law of marriage in Scotland, there is one part of that law which we would willingly see transferred to the English code. In Scotland a child born out of wedlock is legitimated by the subsequent marriage of his parents,[1] provided no legal impediment existed at the time of conception or of birth, and no marriage with another person has since intervened.[2] The House of Lords has very recently applied this rule to a case, in which, though Scotland was the domicile of the father, the mother was English, and the birth and the marriage both took place in England.[3] This doctrine, which was established in the civil law by the emperor Constantine, and in the canon law by Pope Alexander the Third,[4] and which still exists with different modifications, in France, Germany, Holland,[5] Spain, Portugal, and indeed in most of the nations of Europe, and

[1] We are aware that, in advocating legitimation per subsequens matrimonium, while we condemn clandestine marriages, we run some risk of being charged with inconsistency, since it is contended, we believe erroneously, that this doctrine was *originally* founded on a *subtle fiction* that the matrimonial consent had been privately exchanged before the copula. But this technical antiquarian objection is scarcely a fair argument, as it is amply sufficient for us, disregarding the origin of the doctrine, to look simply to its practical working. We rely on no fiction, and care not whether the antenuptial issue be deemed legitimate, from a false presumption of a previous secret marriage, or from the more arbitrary enactment of the legislature. We wish to discuss the subject on broad political principles, rather than on subtle legal technicalities.

[2] 2 Co. Litt. 245 a, note (1), 19th ed.

[3] Countess of Dalhousie v. M'Douall, 7 Cl. & Fin. 817; and Munro v. Munro, id. 842.

[4] Nov. 89, c. 8; 2 Co. Lit. 245 a, note (1), 19th ed.

[5] Id.; Code Civil, 331; Heineccius, Elem. Jur. de Legitimatione.

some of the States of America,[1] has prevailed to the north of the Tweed for more than two centuries and a half, having, probably, been introduced by the bishops and the Commissary Court under the authority of Queen Mary. In England, however, it has never yet been recognized; and, although, so early as the reign of Henry III., its adoption was proposed and warmly debated in the parliament assembled at Merton, when the arguments in favour of the civil and canon law were, as Lord Coke expresses it, "vehemently laboured by the clergy,"[2] yet the barons, in support of the common law, rejected the proposed change with the well known reply, "Nolumus leges Angliæ mutari."[3] This answer has since been much celebrated: we think most unjustly so; since, unless we are greatly mistaken, it was the mere interested language of men, who could not give a good reason for their opposition, and dared not avow the real one; but who knew full well, that if this law was passed in their profligate age, when bastardy was much more frequent than at the present day, and when moreover men had no power of devising their real estate,[4] it would, in no slight measure, deprive them, as lords of the fee, of those frequent and lucrative escheats, which followed the death of their tenants without lawful heirs.[5]

In the nineteenth century, sensible men will require some more valid reasoning in support of the existing law, than a dogged and selfish refusal to admit any alteration. Let us then examine briefly the arguments which the advocates for the English doctrine usually advance.

In the first place, they contend that serious evils will result from the uncertainty which must prevail with respect to the succession of property, if any person, by marrying his mistress in a fit of whimsical caprice, can thus introduce new heirs to his estate, and destroy the reasonable expectations of his relatives. But, in reply, it may well be urged, that a mistress is not more likely to be married "in a fit of whimsical caprice," than any other woman. Indeed she is much less likely, since caprice is the child of passion, which seldom survives the satiety created by possession. The fact is, that

[1] Story, Confl. of Laws, § 93, note (4), pp. 116, 117, 2d ed.
[2] 2 Inst. 98.
[3] Stat. Merton, c. 9.
[4] 2 Bl. Com. 12.
[5] Id. 72, 89, and 247.

men who determine to marry the victims of their seduction, almost invariably do so, either from an honourable sense of tardy justice, or from a feeling of real affection; and this step is very rarely taken, unless the previous conduct of the woman will warrant the confidence reposed in her. As to "the reasonable expectations of relatives," no just argument can be founded on so indefinite a phrase. If relations choose to calculate on the fortunes of their unmarried brothers and uncles, and to act upon such calculation, they must bear the consequences of their unwarrantable conduct: if they sow speculation, they have no right to complain, though they reap disappointment. In truth, this argument, if admitted at all, proves infinitely too much; since it aims an equally fatal blow against the marriage of every man, who, having resisted the matrimonial temptations of early youth, has assumed, in the eyes of avarice, the uncongenial habits of a confirmed bachelor.

It is next argued, in opposition to the Scotch law, that children thereby frequently become entitled to large fortunes, which, from a want of early education, they are wholly incompetent to manage. No instance, however, of such a result in Scotland has ever been given, and, we believe, none could be found. The illegitimate child of a rich man can scarcely be neglected, unless the mother is neglected also; in which case no subsequent marriage ensues; since it requires but a scanty knowledge of mankind to be well assured, that, when once, in a case of illicit love, the embers of affection are allowed to cool, nothing less than a miracle can rekindle them.

The argument, that sickness, by impairing the intellect, and weakening the resolution of the man, may afford a favourable opportunity for the wiles of a designing and profligate woman, so that a death-bed may become the disgraceful scene of a reluctant union, though it possesses much weight in a country where clandestine marriages are permitted, is utterly valueless when applied to a people, by whose laws the marriage ceremony cannot be performed, except in certain public buildings,[1] and after ample time has been afforded for prudent reflection.

[1] The Archbishop of Canterbury, as we have seen, may grant a special licence for marriage in a private house; but under the circumstances alluded to in the text, such, of course, could not be obtained.

The supporters of the English doctrine next urge, that the opposite law has a tendency to promote concubinage, by encouraging a hope, that, in the event of children being born from illicit intercourse, the mistress, for their sakes, may be promoted to the wife. But we contend that this hope is far too remote, the contingency contemplated is far too uncertain, to produce any material influence on the female character. Women are perfectly well aware, without the aid of the orator or the poet, that "men sated by enjoyment, often relinquish with indifference, upon possession, pleasures they have eagerly pursued,"[1] and that

> "The lovely toy, so fiercely sought,
> Hath lost its charm by being caught:
> For every touch that woo'd its stay
> Hath brush'd its brightest hues away,
> Till charm, and hue, and beauty gone,
> 'Tis left to fly or fall alone."

They know that the best chance of courtship terminating in marriage is to be chary of their favours. If then a permanent union is their object, they will scarcely, though acting with a regard to common prudence alone, relinquish the vantage ground of present virtue, in a weak reliance upon a possible parental affection. Women yield to passion, to love, to immediate interest, but never to a sordid calculation of the chances of some future benefit; and we doubt much, if, out of all the countries where legitimation per subsequens matrimonium prevails, a single instance could be found of a woman having prostituted her person, in the expectation of deriving any ultimate benefit from the provisions of that law. It is true, that after the fatal step has been once taken, reflection may suggest a hope of this nature; but if it does, its natural tendency is to check the facilem discensum, by showing the impolicy, if not the criminality, of giving a loosened rein to further vagrant appetites; and morality must be made of stern stuff indeed, if it does not acknowledge the reclaiming influence of such a hope.

It is also true, that after the birth of children, the father may be led to make a late, though, at best, an inadequate

[1] Lord Stowell, in Dalrymple v. Dalrymple, 2 Hagg. 128.

atonement for the wrongs he has inflicted; but this consequence, on which the advocates for the English law lastly rely, furnishes, as we conceive, a strong argument in favour of the Scotch rule. That "an erring sister," who, in a single instance, has deviated from the path of rigid virtue, should be driven with lasting ignominy from the haunts of civilized life: that every door must be scrupulously barred to her repentant return: that stern law and a sterner society should vie with each other in heaping anguish on her head, till without remedy, and without hope, she can only behold, with the prince of darkness,—

> "a lower depth
> Still threatening to devour her open wide,
> To which the Hell she suffers seems a Heaven:"—

this does indeed appear but little consistent with the divine exhortation of that Being, to whom alone error cannot be imputed, and who in pitying mercy bade the adulterous penitent to sin no more. We are certainly no advocates for the voluptuous principles of an Eloise,[1] but we would make every allowance for the frailty of human nature, which is not utterly incompatible with the well-being of society; and we think it consistent alike with the policy and the humanity of the law, to hold out some inducement to the profligate to pause in their guilty career, and, by a long and anxious course of subsequent good conduct, to recover that character which, in the ardour perhaps of first love, they have too lightly regarded.

If therefore, by the adoption in England of the Scotch law, some men should be led to terminate in virtue a connection commenced in crime; an enlightened morality, so far from being shocked, would rejoice at this consequence. It would acknowledge that society would gain, being no longer outraged by the exhibition of open immorality; that the criminal parties would gain, by gradually recovering the esteem they had forfeited; and that the innocent offspring would incalculably gain, first by obtaining the recognized protection of a parent, secondly, by securing that birthright of which a jealous law had deprived them, and lastly, by obliterating

[1] "Not Cæsar's consort would I deign to prove,
No, make me mistress to the man I love."

in a great measure that brand of infamy, which had rendered them unjustly the scorn of mankind.

We know not that the cruelty, and, indeed, the injustice of the English law can be placed in a more vivid light, than by contemplating its actual working, when a man marries a woman who has previously borne him a son. If a second son is the fruit of the marriage, and the property is entailed, this child, to the exclusion of his elder brother, must inherit the whole estate. So also, if the father dies intestate; but granted that a will is made, and that the children are left joint legatees of the personalty; in such a case, the second child pays *one* per cent. legacy duty to government, while the first is stripped of *ten* per cent., because being by the fiction of the law nullius filius, he is held to be in no way connected in blood with his own father. Upon the same principle, neither the father nor the mother has the legal right of guardianship to their first-born,[1] much less can the father appoint a guardian to him by will; but while the second son is entitled to all the rights of a legitimate issue, the first is thrown upon the cold step-mother protection of the parens patriæ.[2] And this harsh and unnatural distinction prevails, though the younger son were born in the afternoon of the wedding day.[3] Conceived, like his brother, in sin, he is nevertheless for all purposes legitimate, because the marriage ceremony has designedly been performed a few hours before his birth. Can any law be imagined better calculated than this to embitter the domestic happiness of such a family, and to steel the elder brother's heart against the sympathies of fraternal love? The father has two sons and but one blessing.

We have dwelt on this subject at greater length, because a case of extraordinary interest has lately been decided by the court of last resort, which, if any were wanting, has furnished the most conclusive evidence of the inconvenience that results from allowing two antagonist laws to co-exist in different parts of the same kingdom. We refer to the case of Doe d. Birtwhistle v. Vardell, where a Scotchman, who had married his mistress after the birth of a son, died intestate, possessing real estates both in England and in Scotland. The

[1] Per Lord Mansfield in Rex v. Felton and Wenman, 1 Bott, 478.

[2] Law Mag. vol. xxv. p. 44.

[3] Co. Litt. 244 a.

Court of Queen's Bench decided, that, though the son as legitimate heir to his father was entitled to the Scotch property, and also to the English personalty, he was incapable of inheriting the lands in England. On appeal to the House of Lords this case was twice argued with great ability, and the judgment was ultimately affirmed.[1]

Thus, according to this decision, which is now the established law of the land, though its correctness has been questioned by Lord Brougham and Mr. Justice Story,[2] the same person is in Scotland legitimate, in England a bastard. As lawful heir to his father he may inherit a Scotch title, and yet be deprived of the English estate which supports it. As a representative peer of Scotland he may sit in the House of Lords, and perform all the functions of a member of the legislature, but he cannot inherit a single acre in England. Nay, should he purchase in after life an estate to the south of "the ideal line," and then die intestate, and without wife or issue, his property would pass, neither to his brother nor to his father, nor even to his mother, but would absolutely escheat to the crown.[3] Such are some of the evils which may arise from this conflict of law respecting personal status; and surely Lord Brougham was amply justified in saying, that "it is absolutely necessary that the legislature should interfere."

If the Scotch doctrine should eventually be established in England, as we cordially desire that it may be, we would add to that law a salutary provision adopted from the code civil;[4] that is, in order to avoid all disputes on the subject of legitimacy, when men marry women who have become mothers before they were wives, we would make the father, at the marriage, publicly acknowledge the children whom he wished to legitimate. The names of these children should be inserted in the register of marriage, a copy of which should in all cases be conclusive evidence of the fact of legitimacy.

We pause here for a single moment to express our disapprobation of the oppressive laws which prevail in England on

[1] 5 B. & C. 438; 6 Bing. N. C. 385; 1 Scott, N. R. 828; Moylan's Report; 2 Clark & Fin. 582.

[2] Story's Confl. of Law, § 93, 94, p. 117—146, 2d edit.

[3] 1 Woodd. 396, 397.

[4] S. 331.

the subject of bastardy. We have no wish to break down the barriers between virtue and vice, but we cannot forget that the poor child has no share in the profligacy of his parents. Despised as he is for crimes not his own, neither policy nor justice can require that the law should aid in oppressing him. That a father, with the best intentions of recognizing, supporting, and educating his natural children, cannot so much as appoint a guardian for their protection; that from every hundred pounds which he leaves them the government should claim ten; these are regulations which, by causing no benefit to society, and much undeserved suffering to individuals, call loudly for amendment. The paltry advantage which the state derives from the high scale of legacy duty fixed in these cases, is as nothing when compared with the iniquitous hardship of thus, as it were, robbing the beggar, and depriving him who hath not of even that which he hath. We know that in olden time it was said, "the fathers have eaten sour grapes, and the children's teeth are set on edge;" but we also know who has denounced this proverb as cruel and unjust, and declared that "the son shall not bear the iniquity of the father.[1]" We fervently hope, that in these days of active benevolence, when advocates of the highest abilities are not wanting, who eagerly exert their best energies in behalf of the factory and mining children, and even of the friendless sweep, some voice may be raised within the walls of parliament to point out the wrongs which the baseborn suffer, and to protect that unfortunate class which, of all the people in the British dominions, are least capable of protecting themselves. It will no longer be said, as it now is, that the legislature, in its treatment of bastards, emulates the conduct of the bully in the charity school, "That's right, Bill, knock him down, and stamp upon him, for he ar'nt got no friends."

If the dissimilarity of the English and Scotch laws on the subject of marriage and legitimacy are remarkable, those which relate to divorces are certainly not less striking. In England, the nuptial contract can be dissolved only by death, or by the assistance of the legislature; and parliament will not interfere till an action for criminal conversation has been

[1] Ezek. c. 18, v. 20.

brought against the paramour, and a separation from bed and board has been obtained from the Ecclesiastical Court, and then, only at the instance of the husband, and on the ground of adultery. In Scotland, a divorce à vinculo matrimonii can be granted by the Court of Session, without any previous investigation before any other tribunal, on the application of the wife equally with the husband, and on the ground, not only of adultery, but of wilful desertion for four years. The average expense of obtaining a divorce in Scotland is about one-fortieth of that which is incurred in England. On a calm comparison of these two systems, we at once award the palm of superiority to that of our northern brethren; but thinking that neither system is, in itself, perfect, we venture, with real diffidence, to suggest a plan, which, by adopting the least objectionable parts of each, and rejecting the remainder, may thus harmonize the laws of the two countries on this most important branch of legislation. The first alteration we propose applies exclusively to the English law, and is comprised in rendering actions for criminal conversation unnecessary as a preliminary step to obtaining a divorce. In not only permitting, but compelling parties to bring such actions, in which, to borrow the language of the mathematician, the beauty and youth of the lady, the fondness and attention of the husband, and the fortune of the paramour, are given to find the unknown damages, England enjoys the rare but degrading privilege of standing alone. No other civilized people in the known world have recognized this law; and its adoption by ourselves has enabled the other countries of Europe to apply to us with bitter contempt the language of the Mantuan bard.

"Et penitus toto divisos orbe Britannos."

Indeed, this method of estimating female virtue by a sordid reference to money, and of enabling a husband to demand pounds shillings and pence, as the price of the dishonour of his wife, in like manner as he would claim compensation for a cracked bowl of Dresden china, is so utterly abhorrent to the feelings of every honourable man, that none but the most dastardly could have recourse to such a proceeding, if the legislature did not consider it a condition precedent to the disruption of the marriage tie. This strictness on the part of

the legislature is founded on the assumption, that the recovery of damages by the injured husband furnishes the surest test of his sincerity, and the best evidence of the absence of collusion. Let us see in what manner it effects this purpose. In the majority of actions which are brought against adulterers, judgment is allowed to go by default. This admits the defendant's guilt; and it only remains for the plaintiff shortly to prove the facts before the sheriff and a common jury, when damages are assessed as of course. In these cases it usually happens that no counsel appears for the defendant. The facts, therefore, sworn to are admitted without inquiry; the witnesses are subject to no cross-examination; the cause is heard ex parte. What security against fraud is afforded by a verdict so obtained? It is true that the House of Lords requires not only that a verdict should be recovered, but that the damages assessed should be levied and retained.[1] Still, if the parties are anxious to collude, what is to prevent the plaintiff from receiving the sum awarded with his right hand, and then, as soon as the bill of divorce has passed, returning it with his left?

It is obvious that this course may be pursued with perfect security, and that an action so conducted can throw no real impediment in the way of design. But granted that the defendant appears to the action and pleads "Not guilty." The cause is called on, and, the ladies being dismissed from the Court, the counsel rises. He has the honour to represent the plaintiff, who, in this distressing cause, appeals to the jury to give him compensation for the most grievous injury which one man can inflict upon another. Compensation! there is no amount of damages which can afford the slightest, for the utter ruin of his client's domestic happiness, by the wiles of a profligate seducer. The parties were married, &c.; the lady was lovely, accomplished, &c.; the cup of happiness was full to overflowing. The defendant becomes acquainted with the happy couple, the acquaintance ripens into intimacy, intimacy into friendship, and friendship is soon too fatally absorbed in a tenderer passion; till, at length, in an hour of weakness, of degradation, and of shame, the lady becomes an object of pity and of scorn, and the wretched husband is at once bereft of

[1] Mr. Taafe's case, Session 1819; Macq. Pr. House of Lords, 624.

his happiness, his wife, and his home; "for without hearts there is no home." He, the counsel, is utterly unable to imagine what course his learned friend will adopt for the defence; but, unless his instructions should prove wholly fabulous, the evidences of guilt will be overwhelmingly conclusive. (Great attention in Court.) He is in a condition to prove not a single act of infidelity only, but a long and distressing course of licentious enjoyment. (Here the audience become excessively eager, and the learned judge wipes his spectacles.) He shall show that on one particular occasion—

The counsel for the defendant now rises, and whispers a few words in the ear of the speaker. A conference takes place between the leaders and the attornies, which lasts about three minutes, during which time the respective juniors fold up their briefs, and busy themselves in indorsing them. The counsel for the defendant then addresses the jury. It gives him sincere satisfaction to assure them that this most distressing case will be withdrawn from their consideration. He knows by long experience how impossible it would be to resist the plaintiff's evidence. They would, therefore, be spared the pain of investigating the indelicate details of this affair. (Here the audience evince manifest tokens of disappointment.) His learned friend had told them truly, that no damages could compensate for the injuries which the miserable plaintiff had sustained. He had, however, consented to take one hundred pounds. They would, therefore, find their verdict for that sum.

"Gentlemen," says the judge, "the learned counsel for the defendant, in the exercise of a sound discretion, has consented to withdraw his defence in this cause, and the plaintiff has agreed to take one hundred pounds." The jury hesitate. "Gentlemen," repeats the judge, "you will assess the damages at a hundred pounds." "My lord," replies one of the jury, "we have heard no evidence." "That is very true," says the judge, "and it is much better that you should not. The parties themselves consent to the verdict, which is only wanted in order to enable the plaintiff to obtain a divorce in parliament.[1] You will, therefore, find for him one hundred

[1] See Lord Brougham's Comments on Lord Ellenborough's summing up in Chamberlayne v. Broomfield, Speeches, vol. iii. p. 447.

pounds." "Gentlemen," says the clerk of the Court, "are you all agreed? You find for the plaintiff damages"——"One hundred pounds," mutters the foreman; "One hundred pounds," repeats the clerk, as he enters the verdict. Now let any man of sense calmly ask himself, how a trial like this can be twisted into a test of collusion; and yet we confidently appeal to the profession to acknowledge, that at least one-third of all actions for crim. con., in which a show of defence is made, are settled in this manner.

The few remaining cases, which are contested in earnest, are those in which the defendant either relies on his innocence, or, at least, on the insufficiency of the proof of his guilt; or else, regardless of the result, and anxious only to gratify his malignant passions, he instructs his counsel, quocunque modo, to hold up his opponent to public derision. In these hostilities, conducted as they frequently are with poisoned weapons, the reputation of the lady, who is no party to the proceedings, and has no counsel present to protect her character from insult, is almost constantly disregarded, and but too often is absolutely sacrificed to the selfish hope of either escaping defeat, or at least of embittering the plaintiff's victory. A trial thus contested may, indeed, furnish considerable proof of the absence of collusion, while the verdict will show the opinion of the jury respecting the merits of the case; but since these real contests rarely occur, and the House of Lords seldom investigate the mode in which the trial has been conducted, contenting themselves with asking what amount of damages has been assessed, and whether payment has been enforced,[1] it is clear that in any subsequent discussion respecting the expediency of granting a divorce, little reliance can be placed on the result of these actions. It thus constantly

[1] Mr. Smith called in:—

"Qu. 80. Were you the attorney employed in bringing the action in the Court of Queen's Bench by Mr. Wyatt against Colonel Rochfort? I was.

"81. Have you recovered the damages in the action? No, none of them.

"82. What was the amount of the damages? £230.

"83. Did you take any proceedings towards enforcing payment of these damages? We have issued process of outlawry against Colonel Rochfort."

Mr. Davis called in:—

"84. Do you produce the proceedings of outlawry and the judgment of the Court of Queen's Bench? I do."—*Min. of Evi. on Second Reading of Bill of Wyatt's Divorce*, May, 1841.

happens that the legislature will, on the one hand, reject a bill for divorce, though very large damages have been recovered; and, on the other, dissolve the marriage, in the face of mere nominal damages, or even of a verdict for the defendant.[1] In Mr. Cope's case,[2] the jury assessed the damages at 1500*l.*; in Mr. Crewe's case, at 3000*l.*;[3] in Colonel Powlett's case,[4] at a like sum; but by neither of these gentlemen could a divorce be obtained. In the cases of Mr. Chamberlain,[5] Lord Lismore,[6] Mr. Graham,[7] and Mr. Malpas,[8] nominal damages were awarded; and in Mr. Loveden's case,[9] the defendant gained a verdict; yet in all these instances divorces were granted by the legislature.

Many of the observations we have just made, on the impropriety of requiring the injured party to proceed by action of law against the adulterer, apply equally to the necessity imposed on him by the House of Lords,[10] of obtaining a sentence of separation from the Consistorial Court, previously to his presenting any petition for a bill of divorce. The proceedings before the ecclesiastical tribunals being, with the exception of the addresses of counsel, conducted in writing, and the witnesses being there examined by the cumbrous method of interrogatories, little opportunity is afforded of testing the existence of collusion. The Lords are not bound by the decisions of these Courts, any more than by judgments obtained in Courts of Law; but in all cases require the attendance of witnesses, who are examined vivâ voce at the bar of the House. Indeed the verdict at law, and the divorce a mensâ et thoro, though the former preliminary can only be dispensed with on very special grounds, and the latter is indispensable, are both together regarded by parliament with such indifference, that they do not so much as waive the necessity of a formal proof of marriage for the third time;[11] and in more than one case, the House of Lords has rejected a bill for want of proof of adultery, though the very same evidence that was presented to their lordships had already satisfied the Court of Law and

[1] Macqueen's Practice of House of Lords, 490, 491.
[2] Session 1801; id. 593.
[3] Session 1801, 1802; id. 599.
[4] Session 1809; id. 605.
[5] Session 1814; id. 491.
[6] Session 1826; id. 640.
[7] Session 1827; id. 644.
[8] Session 1835; id. 491.
[9] Session 1811; id. 606.
[10] Standing Order, No. 141; Macqueen, 496.
[11] Macqueen, 534.

the Spiritual Court. Thus in 1809, Colonel Powlett failed to obtain a divorce à vinculo on evidence of adultery, which had led a jury to award in his favour 3000*l.* damages, and had gained for him an ecclesiastical divorce;[1] and in 1824, Sir William Wiseman, under similar circumstances, would have lost his bill, had he not fortunately succeeded in procuring more conclusive evidence of the guilt of his wife.[2]

Stronger cases than these could not be cited to show the impolicy of requiring three separate public investigations before the legislative will pass a bill for a divorce. A man may lose every shilling he possesses by a single decree in equity, or a single verdict at law. Nay, he may be convicted of murder, and executed, after one public trial. Why, then, may he not be divorced in as simple a manner? Truth is certainly as important and as difficult of attainment in cases where property and life are at stake, as in those which relate to the dissolution of the marriage tie. The necessity for a thrice told tale, established by the legislature in granting divorces, not only imposes an enormous expense on the petitioner, but causes, by the repeated details it occasions, much needless suffering to the parties immediately concerned, and produces a very prejudicial effect on the morals of the community. Man is an imitative and an imaginative animal; and there is no doctrine of ethics more universally admitted than this, that many persons, especially in humble life, who, but for hearing an animated account of crime, would have followed "the even tenour of their way" in comparative purity, no sooner listen to a tale of vicious enjoyment described in vivid language, than they are led, as it were instinctively, to attempt the commission of a similar offence.[3] We do not, on this account, denounce all public inquiry in cases of infidelity, since publicity is the only means by which fairness can be insured; but we object to the examination being carried further than is strictly necessary for the discovery of truth: and we contend that for this purpose one rigid investigation is as effectual as fifty. In Scotland, a single trial is sufficient, and the same law, we believe, prevails throughout Europe. It should pre-

[1] Macqueen, 605. [2] Macqueen, 631.

[3] See some remarkable instances of this imitative tendency mentioned in Mr. Sampson's Criminal Jurisprudence, pp. 104, 105, 2nd edit.

vail in England. In all cases of divorce there should be one inquiry before one tribunal. But that tribunal should not be the House of Lords, either in its legislative or its judicial capacity, and this leads us to consider how far the law, which, in England, renders marriage indissoluble by mere *judicial* authority, is consistent with justice or expedience.

It is well known that the doctrine of the absolute indissolubility of the nuptual tie was first propounded as an essential point of Catholic belief in 1563 by the council of Trent;[1] and among those nations, who regard marriage as a sacrament, it may still find some intelligent advocates. But, in this country, where marriage is regarded simply as a civil contract,[2] and where not even the sanctions of religion are, of necessity, superadded,[3] the arguments in support of its indissolubility, founded, as they are, on ecclesiastical dogmas, fall at once to the ground. This law, no doubt, has been recognised in all English Courts of Justice for two hundred and forty years, the question having been solemnly raised before the Star Chamber in 1601, when Archbishop Whitgift, with the advice of the most eminent civilians and divines, declared that adultery was only a cause for divorce a mensâ et thoro.[4] The frightful consequences, however, of this law, which, in the language of Milton, "changed the blessings of matrimony not seldom into a familiar and coinhabiting mischief, at least into a drooping and disconsolate household captivity, without refuge or redemption,"[5] soon became so apparent, that a plan was adopted for avoiding its oppressive obligation.

In 1669, Lord Roos, who was afterwards Earl of Rutland, applied to parliament for an express act to rescind his marriage.[6] His prayer was granted, though after a severe struggle, but the precedent was too valuable to be long neglected. Similar applications, before the close of the century, were successfully made by the Duke of Norfolk[7] and the Earl of Macclesfield,[8] till at length the doubtful precedent of one generation became the established law of the next. This remedy in cases of adultery has now, for many years, been

[1] Macqueen, 471.
[2] Story, Conf. Laws, 2nd edit. p. 171.
[3] 6 & 7 W. IV. c. 85.
[4] Rye v. Foljambe, Moore, 683; and 3 Salk. 138. See Macqueen, 470.
[5] Milton's Prose Works, vol. i. p. 178.
[6] Macqueen, 551.
[7] Macqueen, 562.
[8] Macqueen, 574.

regarded as a matter of course, if not a matter of right, provided the petitioner has behaved with ordinary propriety, has complied with the Standing Orders,[1] and enjoys a sufficient fortune to enable him to incur the expense. It is therefore clear, that, although in legal strictness and in form, a bill of divorce is a private ex post facto law, made for the express convenience of a party, who is left without protection by the ordinary Courts of Justice, yet, in reality, it is no more than a clumsy, expensive, and at times inadequate mode of obtaining a remedy, which might be far better afforded by judicial authority.

Indeed the interference of the Lower House in bills of divorce, is truly ridiculous, and serves no possible purpose, but to consume the public time, and to swell the costs of the petitioner. These bills have, with one exception, always been commenced in the House of Peers,[2] but until very lately, as soon as they had passed the Lords, the cases underwent a fourth examination at the bar of the House of Commons. This was usually conducted in a somewhat superficial manner, and in the Session of 1839 the Commons, feeling that the investigation before them had become nothing more than a mere matter of form, transferred their duties to a select committee, who have ever since conducted the proceedings of the Lower House in bills of divorce. The contemplation of the fifteen gentlemen, who compose this committee, busying themselves in solemn inquiries respecting the due service of notices, orders, &c.,—asserting their "power to send for persons, papers, and records,"—studying the minutes of evidence taken upon the reading of the bill before the Lords,—and then reporting with becoming gravity to the House the result of their arduous investigations, would be fitting matter for merriment, were it not for the consideration how much more usefully the members of the legislature might be employed than in thus wasting their energies in laborious and costly idleness.

We have already, in a former article,[3] attempted to point out the leading defects of a system, which bestows judicial functions on a legislative body. We will not here repeat our arguments, but content ourselves with observing, that as bills

[1] Brougham Speeches, vol. iii. p. 446.
[2] Macqueen, 501, 502.
[3] Law Mag. vol. 29, Art. i.

of divorce are in substance judicial trials, we would render them such in form, and would transfer to the Judicial Committee of the Privy Council the power of deciding upon their merits, together with the other matters now subject to the appellate jurisdiction of the Lords.

It has been justly observed by Mr. Macqueen, that "the Judicial Committee of the Privy Council is armed with a very efficient machinery for the investigation of evidence;"[1] the seventh, eighth, and ninth sections of the act 3 & 4 Will. IV. c. 41, enabling that Court to examine witnesses on oath, either vivâ voce or upon written depositions, and the tenth section empowering them to direct issues for trial at law. Questions of divorce might therefore be heard before that tribunal, without any previous inquiry, and marriages might be annulled, as they now are in most of the American states, and some of the Continental countries, by bill and answer.

One manifest improvement that must result from this change, would be a great diminution of expense in obtaining a divorce. At present, the costs are so heavy that none but the wealthy can seek relief from Parliament. Thus, the expenses actually incurred last session in prosecuting Mr. Mitford's divorce, were as follows:—

Costs of action.	£161 : 11 : 5
Proceedings in Doctors' Commons .	283 : 14 : 0
Parliamentary costs	537 : 17 : 8
	£983 : 3 : 1

In that case no particular opposition was thrown in the way of the petitioner, and his expenses were lessened by some personal friend getting up and managing the evidence. The average cost of an ordinary divorce ranges from 1000*l.* to 1500*l.*, and, if difficulties occur, the amount is much larger. It is well known that Lord Ellenborough's cost nearly 5000*l.* The necessary consequence of this is, that no man of moderate circumstances can ever hope to obtain a divorce; and thus, while "equal laws to the rich and poor" is the daily theme of the statesman and the judge, the public have practical experience of the value to be attached to these ἔπεα πτερόεντα.

It is absurd to say that the legislature should discountenance

[1] Macqueen, xii.

divorces, and that therefore it is right to make the cost of obtaining them as heavy as possible. If divorces are to be discountenanced, let them be so to all persons alike; nay, if you will, make marriage absolutely indissoluble;[1] but do not refuse to the poor man, what you would grant without scruple to the rich. The loss of a thousand pounds by the possessor of half a county is not felt, but a demand of that sum from the honest tradesman is utter ruin. Yet why should the one be compelled, "spite of antipathy, to fadge together, to his unspeakable wearisomeness," with a woman who is perhaps no better than a prostitute, while the other can dissolve the nuptial tie with the greatest facility? Domestic happiness is as important to the poor curate, the tradesman, or even the artisan, as to the wealthiest peer that sits in the House of Lords. Indeed it is more important, since the man of substance has a thousand pursuits, whether of ambition, frivolity, or whim, which render him less dependent on individual affection, while few enjoyments remain to the poor man beyond those which are connected with his home.

The contrast afforded by the Scotch law in this particular is indeed striking. The average expense of disannulling a marriage in the Court of Session is about 30*l.*; and we have been assured by a Scotch practitioner, of great experience in proceedings of this nature, that he has lately carried through four unlitigated divorces, in none of which did the costs amount to 20*l.*; and in one, the entire sum spent was 15*l.* 17*s.* 6*d.* The remedy is thus placed within the reach of every one who is not actually a pauper; and the resulting benefit cannot be better ascertained than by observing the class of persons in whose favour divorces are actually granted. In a list (forming an appendix to this article) of all the decrees of divorce pronounced in the Court of Session from November, 1836, to November, 1841, we find four servants, four labourers, two soldiers, one sailor, and every variety of small shopkeepers. In short, out of the ninety-five divorces which were granted in Scotland during that period, there are certainly not more than six that could by possibility have been obtained in England.

[1] This is still the law in some Roman Catholic countries; for instance, in France, where since 1816, "la separation de corps" has alone been allowed. See Rogron, Code Civil. p. 143.

We are well aware how chimerical is the notion of reducing the charges before the Privy Council to the parsimonious standard of Scotch justice; but certainly much might be done in the way of approximation; and, whatever was done, would be clear gain. In cases where the facts are clear, there is no reason why the solicitor's bill should exceed the sum of 100*l.*

The list we have referred to is also valuable, by showing how groundless are the apprehensions of those persons who think that, if the door of relief were once opened to "household unhappiness," the rush of applicants would endanger the well-being of society. In Scotland, with a population of above two millions and a half,[1] ninety-five divorces have been granted in five years, making an average of nineteen each year; a number, which (although considerable in comparison with England, where, during the same period, with a population of nearly sixteen millions, the average has been less than five a year), can scarcely be regarded by the most timid as formidable to the interests of morality.[2]

Milton has put this subject in a proper light, when, in speaking of the difficulty of disannulling marriage in England, he observes, that "It is next to be feared, if the husband must be still bound without reason by a deaf rigour, that when he perceives the just expectance of his mind defeated, he will begin, even against law, to cast about where he may find his satisfaction more complete, unless he be a thing heroically virtuous."[3] It cannot be too often repeated, what this profound thinker has said in another place, that "honest liberty is the greatest foe to dishonest licence."[4] If, then, due precautions are taken against fraud and collusion, we are persuaded, that the extending of the remedy of divorce to all classes in the kingdom, so far from being prejudicial to morality, would have a directly contrary effect. Much public scandal would be spared, and much private misery averted.

Besides, it must be remembered, that more than one-third of the divorces contained in the Scotch list we have men-

[1] Census 1841, England and Wales, 15,911,725; Scotland, 2,620,610.

[2] It appears by the Fourth Annual Report of the Registrar General of Births, Deaths, and Marriages, that in the year ending June 30th, 1841, 122,482 marriages were registered in England. During the same year there were 5 divorces, or about 1 divorce to 24,496 marriages.

[3] Milton's Prose Works, vol. i. p. 186. [4] Id. p. 174.

tioned,[1] were granted in favour of women; and we have seen that, in England, the remedy is now open to the husband alone. It may be well doubted, whether the antagonist laws which prevail on this subject to the north and the south of the Tweed, are not alike removed from the principles of an enlightened jurisprudence.

To afford, as in Scotland, and in the other Protestant countries of Europe,[2] equal facility to men and women in obtaining divorces for adultery, is to forget that, though the guilt may be the same whichever party is the adulterer, the consequences are extremely different. Dr. Johnson observes, that "confusion of progeny constitutes the essence of the crime; and, therefore, a woman, who breaks her marriage vow, is much more criminal than a man who does it."[3] This language is not strictly accurate, since the danger of imposing a spurious issue on the husband is not the essence, but only an important ingredient, of adultery; still it sufficiently marks the distinction between the infidelities of the husband and those of the wife. The injury sustained by the respective parties being thus different in degree, the legislature should not apply one common remedy, and impose one common punishment.

The opposite law of England, which denies all redress to the injured wife, is, at least to an equal extent, deserving of censure. We are aware that in three instances parliament has relaxed this strict rule; but in two of these cases,[4] the husband had committed incest; and in the third,[5] he had commenced his matrimonial life by diseasing his wife, had followed it up by a course of disgusting vice, and had closed it by being convicted of bigamy and transported for seven years. In two other cases,[6] which, with the three just mentioned, have alone been presented to parliament, the wife failed in obtaining redress, though the conduct of the husband had been most flagitious. These cases deserve further consideration. In the first (Mrs. Teush's), which occurred in

[1] See Appendix to this Article. [2] Macqueen, 482.

[3] Boswell's Johnson, vol. ii. p. 46.

[4] Mrs. Addison, Session 1801, and Mrs. Turton, Session 1831; Macqueen, 475—479, 504, and 657.

[5] Mrs. Battersby, Session 1840; Macqueen, 479 and 667.

[6] Mrs. Teush, Session 1805, and Mrs. Moffatt, Session 1832; Macqueen, 480—482, 602 and 658.

1805, Dr. Horsley, then Bishop of St. Asaph, admitted that the case exhibited the grossest infidelity. "It was not," said his lordship, "a single action upon sudden impulse of passion; but a deliberate abandonment of a well-deserving woman, and a taking up of a strumpet to the husband's arms, in which he persevered for many years." Yet in spite of this admission, he opposed the second reading of the bill, contenting himself with a loose statement that "it would, on the whole, be better if no bill of this kind were passed;" and that "he could not understand how the lady's circumstances would be improved by a dissolution of the marriage, which would involve the loss of the alimony, awarded to her by the Spiritual Court."

On this last question the right reverend prelate might have assumed that the petitioner herself was the best judge, and she probably imagined that a second advantageous marriage might be more productive of happiness than even the receipt of alimony. Lord Eldon also opposed this bill "on general grounds of public morality;" and it was thrown out by a majority of three. Mrs. Moffatt's bill was discussed in the session of 1832. The facts proved were shortly these: Mr. Moffatt, on the very night of the marriage, committed an act of infidelity, and subsequently seduced many of his servants. He frequented the lowest society, and was an habitual drunkard; and when his wife was at length obliged to leave him in consequence of his notorious profligacy, he took apartments within the rules of the King's Bench Prison, and openly cohabited with a common prostitute. Lord Eldon, finding cause, on further reflection, to doubt the correctness of his former opinion, actually moved the second reading of this bill, and closed his remarks by observing, that "he saw no reason why a woman was not as much entitled to sue for divorce as a man."

The bill was lost, on the opposition of Lord Brougham, who made use of the following curious argument. "He begged their lordships would look at the consequences of such a proceeding as this. Any man, who desired to get rid of his wife has only to go and keep a mistress, and, as the natural consequence of such conduct, to desert his wife, and thereupon he instantly drives her to an application to this House; a divorce is obtained, and his purpose is served."

It might with similar propriety be said, that "any woman who desires to get rid of her husband, has only to hire a handsome footman, and invite his attentions, when her lord is instantly driven to seek a divorce, and *her* purpose is served;" yet who ever thought of urging such an argument in opposition to the husband's claim? It is gratifying to know that these sentiments do not coincide with the present opinions of Lord Brougham, who, like Lord Eldon, has been led, by a more profound consideration of the subject, to adopt different views, and his lordship now stands forth in his printed observations on Divorce[1] as the avowed champion of female rights.

Here then are two great names that have been slowly gained over to what we consider the cause of justice and humanity; but, after all, the best advocate for the change we propose is to be found in the natural feelings of mankind. We would therefore respectfully, but earnestly, beg each member of the legislature to assume, that the fate of Mrs. Moffatt may be that of his own daughter, and then let him ask himself, whether it is desirable that the present law should any longer continue?

The alteration we propose, and which we wish to extend equally to Scotland and England, is this. Let the wife sue for a divorce, not indeed for a single act of secret infidelity, since, if this were the law, and no statute of limitations prevailed, there are few husbands of the age of fifty who would not have cause to tremble, but on the ground of open, flagrant, and systematic adultery. These words are indefinite, but no fair objection can be made to them on that account. Questions of probable cause, reasonable time, malice, intention, negligence, &c. are all equally indefinite, involving the application of a legal principle to a vast variety of special circumstances; and yet no substantial difficulty exists in solving these questions. There is one point which should be left beyond all doubt. No woman should be refused redress who has been insulted by the open presence of a rival under the husband's roof. Seneca has remarked, with equal truth and feeling,

"Ultimum est nuptæ malum
Palam mariti possidens pellex domum."

[1] Speeches, vol. iii. p. 448.

The next alteration we propose relates to the subject of desertion. In Scotland, by positive statute,[1] if either party wilfully and without reasonable cause desert the other for four years, and then disobey the judgment of the court in an action of adherence (which is a proceeding somewhat similar to an English suit for restitution of conjugal rights), the marriage may be annulled.[2] But in England malicious desertion, by itself, is not even a ground for ecclesiastical separation from bed and board.[3] In contrasting these two laws we are again obliged to pronounce an opinion in favour of the Scotch practice, which we would gladly see extended to England. Marriage is a solemn promise made between a man and his wife, that, notwithstanding poverty or infirmity, they will live faithfully together during their joint lives; and divorce is allowable in cases of adultery, because by that crime the very essence of the nuptial contract is directly violated. Is it not equally violated by a wilful and continued desertion, which defeats the chief purpose for which marriage was instituted? What reasonable hope can remain, that a party, who for a period of four years, has obstinately set at nought the duties which result from this contract, and that too after a judicial warning to regard them, can ever be induced to give up his confirmed habits of neglect, and to become an object of real affection or comfort to the wife he has despised? Yet unless such hope exists, why should not a divorce be allowed? In all questions of granting or refusing divorce, the legislature should aim at three objects,—the happiness of the married couple, the happiness of their children, and the general promotion of good morals. Which of these objects will be attained by refusing to annul a marriage in the case of determined desertion? A woman thus abandoned by her husband is of necessity placed in circumstances of the most trying nature. We speak not here of her pecuniary difficulties, which indeed are in general sufficiently great, but of the position which she occupies in society. If she excludes herself from the world she cannot fail to be miserable; if she mingles

[1] 1573, c. 55.

[2] Ersk. Inst. 150; St. Inst. 29; Macqueen, 474.

[3] Per Sir William Scott in Evans v. Evans, decided in 1790; 1 Hag. Con. R. 120; Macqueen, 474.

in scenes of gaiety she is scarcely less wretched; for the tongue of slander is never silent; her most innocent actions are misconstrued; her words, her looks, are wilfully misunderstood. But, beyond all this, the unprotected state in which she is compelled to live, makes her doubly liable to the solicitations of the libertine, while the natural feeling of wounded pride renders her less capable of virtuous resistance. If then to these combined causes she at length yields, we may pity the victim, but we can blame only the law. It is probably from reflections of this nature that the other Protestant countries of Europe have long since established a practice[1] substantially similar to that which prevails in Scotland; and as no evil consequences have resulted in those countries, none need be feared in England should she follow their example.

It may here be observed, that Archbishop Cranmer and the eminent divines who, in the reigns of Henry VIII. and Edward VI., acted as his coadjutors in drawing up the report entitled "Reformatio Legum Ecclesiasticarum," advised that divorce should be granted for malicious desertion as well as for adultery;[2] and Bishop Cozens, to whose powerful and scriptural argument Lord Roos was mainly indebted for the success of his unprecedented application to parliament to anuul his marriage, adopted without hesitation the same view.[3] In matters of this kind these names are surely entitled to considerable weight.

We now come to the consideration of a question, respecting which much difference of opinion is known to prevail, namely, when divorce is granted on the ground of adultery, should the guilty parties be capable of intermarrying? We are decidedly of opinion that they should not.

By a standing order of the House of Lords, No. 176,[4] no bill for a divorce can be received, unless a clause is first inserted, prohibiting the intermarriage of the adulterers; but this clause is now, as a matter of course, struck out on the second reading of the bill. When in the year 1800, Lord Auckland proposed to embody in an act the provisions of this standing order, Lord Eldon justly observed, with reference to the practice here detailed, that the law, as it stood, was a

[1] John Voet de Divortiis, lib. 24, s. 9; Macqueen, 474.
[2] Macqueen, 467. [3] Id. 474, 557. [4] Id. 509.

farce and a mockery; while Lord Grenville declared, that he never had been present at the passing of a divorce bill, without thinking that the House was disgraced and degraded. Indeed, can any conduct be considered more ridiculous, than that of first establishing an order, and then uniformly treating it with contempt? The fact is, that this rule was originally propounded, and is still retained, on a comprehensive view of the real interests of public morals; but its adoption in each particular case is rejected, from a false feeling of misdirected humanity. If a discussion occurs upon the subject, one noble lord alludes to the cruel fate it imposes on the woman, a second denounces it as prolonging the unseemly spectacle of adultery, and a third, perhaps, urges the claims of the yet unborn offspring;[1] while few are inclined to remark, with Lord Eldon, that by rejecting the rule, the House contributes to that very temptation which its principle went to disarm. The real question should be, not whether, by disregarding the rule, the adulterers will be placed in a less painful position, but whether, by adopting it, the crime of adultery will not be greatly diminished. When women once become acquainted with the fatal consequences of their misconduct, they will be forced, by the strong motive of self-interest, to resist temptation; and even men, unless they are utterly profligate, will pause before they inflict upon persons whom they love an injury for which they cannot atone. As the law at present stands, adultery is constantly committed, if not with the avowed object of insuring a subsequent marriage, at least with a comparative disregard of the consequences of discovery. The law, therefore, affords no assistance to morality, where religion and good feeling have refused their aid. On the contrary, it offers in many instances a premium for the commission of adultery. We admit, that by disabling the guilty parties from intermarrying, the punishment of the detected adulteress becomes far more severe; but is not the injury she has inflicted on her husband, and the outrage she has committed on society, severe also? When a thief is sentenced to transportation, or a libeller to imprisonment, men of sense will not screen them from the penalties which a just law inflicts, because they know that it is chiefly by punishing the

[1] See Macqueen, 509, 510.

guilty, that the innocent are deterred from a like career of crime.

The principle for which we contend has already been recognized by the legislature in the bastardy clauses of the Poor Law; and although we should ourselves have shrunk from applying it to the cases there contemplated, we must confess that its stern adoption has on the whole been productive of beneficial results. In Scotland, for two hundred and forty years, the disabling law has prevailed,[1] having been borrowed, as Mr. Erskine assures us,[2] from the Roman law, and we believe that those, who are best acquainted with its practical working beyond the Tweed, would most zealously advocate its introduction into England.

There is no doubt that some few men, wholly selfish, destitute of honour, yet slaves to public opinion, would hail with satisfaction the adoption of this law, which would enable them to intrigue with less personal risk, since, though detected, they could not be permanently fettered. Still we do not think that men would often be actuated by such motives, and we ground our opinion on the fact that, with the present law, married men are comparatively seldom defendants in actions for criminal conversation; yet if these motives possessed a general influence, it would seem to follow as a natural consequence, that by far the larger number of adulterers would be married men, as they at least, under no state of the law, can be enabled, much less compelled, to marry their victims.

Besides, the legislature may easily afford a remedy to this partial evil, by making adultery an indictable offence. We do not pledge our opinion to be in favour of this change, but it certainly deserves serious consideration whether an act might not with advantage be passed, rendering all such adultery, as would authorise the granting a divorce, a misdemeanor, punishable as to the woman, by imprisonment, and as to the man by imprisonment and fine, but confining the right of prosecution to the injured party, and limiting the trial to six or eight months from the date of the offence. It is not likely that many persons would have recourse to criminal proceedings; but the knowledge that indictments *might* be preferred in every case, and the fact that they *would* be prosecuted in all cases

[1] St. 1600, c. 291. [2] Erskine's Inst. 150; St. Inst. 28, 29.

of unusual aggravation, would go far towards checking the prevalence of a crime, which in its consequences is productive of most frightful misery. In the penal code of France[1] the law is not unlike that which we here offer for consideration, and in Scotland it is well known that adultery is open to criminal prosecution.[2]

The only remaining question which we propose shortly to discuss, relates to the power exercised in Scotland of granting divorces, where parties are married in England.

In Warrender v. Warrender[3] the House of Lords solemnly decided in favour of this power, where the husband applying for the divorce was a domiciled Scotchman. So far no reasonable objection can be raised to the jurisdiction of the Scotch Courts; but in fact they claim, and for a long series of years have exercised, a far higher right, namely, that of granting divorces in favour of foreigners, provided the party seeking their interference has resided in the country for forty days.[4] It thus frequently happens, that Englishmen who fail to obtain Parliamentary relief, have recourse to the Scotch tribunals, and by living in Edinburgh for a few weeks are enabled to frustrate the laws of England. To give a single instance, where many might be furnished, Mrs. Teush, on the rejection of her bill by the Lords, proceeded to Scotland, and there obtained a divorce.[5] Had she subsequently married in Scotland, she would thus have had two legal husbands at the same time, one to the north, and the other to the south, of the Tweed. The children by her second marriage would have been legitimate in Scotland, and bastard in England. Had she married in England, after this Scotch divorce, she would, on the authority of Lolley's case,[6] have been guilty of bigamy, though in Scotland such marriage would be recognized as valid.

It is not necessary to dwell further on the embarrassments which arise from this conflict of the law. If the amendments we have ventured to suggest are carried into effect, no inconvenience will result from this Scotch claim; but if they are not, it is surely inconsistent with the dignity of a British Par-

[1] Art. 336—339.

[2] See 25 Law Mag. p. 24, an article headed "Adultery—Is it indictable?"

[3] 9 Bligh. 89.

[4] Lord Brougham's Speeches, 3 vol. 467.

[5] Macqueen, 604.

[6] Rus. & Ry. C. C. 237.

liament to allow these anomalies any longer to continue. In all questions of divorce, let the Scotch jurisdiction be confined to those cases alone, in which one of the parties at least is bonâ fide domiciled in Scotland at the time when the suit is commenced, and for these purposes let the wife have a domicile independent of that of her husband. We can see no possible objection to this scheme, but feel persuaded, that, on the contrary, it would prove highly advantageous to both countries.

Such is a general sketch of the alterations required for assimilating the English and Scotch laws on marriage, legitimation, and divorce; but in order that our readers may have a clear and connected idea of our view, we shall here close our remarks by advancing the following propositions.

1st. In all marriages of minors, who are neither widows nor widowers, the consent of parents or guardians should be absolutely necessary, confining the age of minority for this purpose to 21 in men, and 19 in women.

2nd. In marriages by banns, in addition to the usual proclamation, lists, containing the names, residences, and occupations of the parties intending to marry, should be affixed to the Church door, or other convenient place.

3rd. Subject to these alterations, the provisions of the English marriage laws should extend to Scotland; or, if this cannot be effected, all runaway Scotch marriages by English parties should be void.

4th. The Scotch doctrine of legitimation per subsequens matrimonium should extend to England.

5th. Recognized bastards should be placed on the same footing as legitimate children, as far as relates to the Stamp Acts, and the power of the father to appoint guardians.

6th. No action for criminal conversation should be required previously to obtaining a divorce.

7th. No sentence of separation by the Spiritual Courts should be required previously to obtaining a divorce.

8th. The right of granting divorces should be transferred from the Legislature to the Judicial Committee of the Privy Council.

9th. The expenses of obtaining divorces should be rendered as moderate as possible.

10th. Divorces should be granted in favour of women, not, as at present in Scotland, for a single act of secret infidelity, but for open, flagrant, and systematic adultery.

11th. Divorces should be granted on the ground of wilful desertion for four years, if followed by disobedience of a judicial requisition to cohabit.

12th. Adulterers should be incapable of intermarrying.

13th. All such adultery, as would authorize the granting a divorce, should be a misdemeanor, punishable by fine and imprisonment, but the right of prosecution should be confined to the injured party, and be limited to six or eight months from the date of the offence. Semble.

14th. In case the above alterations are not introduced, the jurisdiction of the Scotch Courts in questions of divorce should be confined to those cases, where one of the parties is bonâ fide domiciled in Scotland at the time when the suit is commenced.

Lastly, for this purpose the wife should have a domicile independent of that of her husband.

We are well aware that these are great and important changes, and that timid and time-serving statesmen may shrink from the responsibility of introducing them at once; but reason teaches the inutility, and experience proclaims the danger, of piecemeal legislation. The evil of the present system is admitted on all hands to be grievous: its anomalies, its oppression, its shame cry aloud for an enlightened amendment; and surely we have not now to learn for the first time that "in rebus arduis ac tenui spe, fortissima quæque consilia tutissima sunt."

LIST of DECREES of DIVORCE pronounced in Court of Session, from November, 1836, *till November,* 1841,

From November, 1836, *till November,* 1837.

1..Nov. 16, 1836. Jemima Thomasina Grant v. William Duff, sometime Merchant, in Cromarty.

2..Nov. 22, 1836. William Crives, Officer of Excise, at Keith, v. Janet Walker.

3..Dec. 8, 1836. Margaret Hadaway v. Joseph Courtenay, Musician.

4..Dec. 17, 1836. Robert Swan, Cowfeeder, Edinburgh, v. Janet Mack.

5..Feb. 2, 1837. Mary Cossar v. William Currie, residing at Johnstonelee, near Annan.

6..Feb. 7, 1837. Lydia Teulon v. Alexander Donaldson, Spirit Dealer, in Edinburgh.

7..Feb. 16, 1837. Eliza Bullen v. Dickinson Wright Grundy, Builder, sometime of Horncastle, County Lincoln.
8..Feb. 16, 1837. Jean Farlie v. Peter Montgomerie, sometime Surgeon at Balfron, now abroad.
9..Feb. 21, 1837. Thomas Pirie, Merchant, in Aberdeen, v. Anne MacBean or Brown.
10..March 1, 1837. Alexander Tweedie, Carver, in Glasgow, v. Helen Spence.
11..March 9, 1837. Isabella Chisholm v. Thos. Lyall, Man servant, in Edinburgh.
12..March 11, 1837. Janet Armstrong v. Jas. Charles Coke, residing in Edinburgh.
13..March 11, 1837. John Lea, Dentist, in Edinburgh, v. Ann Robertson.
14..March 11, 1837. Ebenezer Johnstone, Printer, in Sterling, v. Anne or Agnes Hutton.
15..March 11, 1837. Robert H. Thompson, formerly Jeweller, in Glasgow, v. Janet Bulloch.
16..March 11, 1837. Peter Macfee, Shipmaster, in Saltcoats, v. Margaret Carey.
17..June 22, 1837. Jas. Alexander, Cabinet Maker, in Dundee, v. Marg. Brown.
18..July 5, 1837. James MacGrigor, Mason, in Glasgow, v. Jean Walker.
19..July 7, 1837. Anne Forsyth v. William Lloyd, of Liverpool, Gentleman.
20..July 7, 1837. Wm. Calder, residing at Hill, Muiravonside, v. Marg. Calder.
21..July 11, 1837. John Wilson, Baker, Temple, v. Catherine Bold.

From November, 1837, *till November*, 1838.

1..Nov. 24, 1837. John Smith, Baker, in Glasgow, v. Margaret Mac Kerrow.
2..Nov. 29, 1837. Isobell Buchanan v. John Downie, Shoemaker, in Greenock.
3..Dec. 20, 1837. Robert Sim, Farmer, Newton of Arbirlot, v. Margaret Myles.
4..Dec. 20, 1837. Mrs. Isabella Kenrick v. Charles Kenrick, sometime of Alwalton, in Huntington.
5..Jan. 16, 1838. Amelia Anne Mackay v. James Munro, Baker, in Edinburgh.
6..Jan. 16, 1838. Alex. Donaldson, Last Maker, Edinburgh, v. Cath. France.
..Feb. 1, 1838. Anne Millar v. John Robertson, Weaver, in Fife.
8..Feb. 20, 1838. Catherine Young v. Adolphus Frederick Ponsonby, 35, York Place, Edinburgh.
9..March 10, 1838. Isabella Murray v. Alexander Mac Lauchlan, Labourer, at Blainslie.
10..May 23, 1838. Janet Mac Arthur v. Timothy Mac Affet, Labourer, now in Ireland.
11..May 25, 1838. A.M.Henderson, Hatter, Edinburgh, v. Patricia W. Kinnison.
12..June 7, 1838. Jane B. Campbell v. Daniel Forbes, sometime in Glasgow.
13..June 26, 1838. *Poor* Wm. Lockhart, residing in Edinburgh, v. Agnes Brown.
14..July 3, 1838. George Forfar, residing in Dunfermline, v. Janet Watson.
15..July 6, 1838. William Leck, Plasterer, in Glasgow, v. Margery Stevenson.
16..July 7, 1838. Samuel Barker, Captain, Stirling Castle Steamer, v. Sophia Leadbetter.
17..July 11, 1838. Grace Rutherford v. William Sinclair, Broker, in Glasgow.
18..July 11, 1838. Janet Halket v. Alexander Wilson, Tailor, in Edinburgh.
19..July 11, 1838. Thomas Henderson, Tailor, in Glasgow, v. Christian Brown.

From November, 1838, *to November*, 1839.

1..Nov. 23, 1838. John Eager, Teacher of Music, in Edinburgh, v. Charlotte Barnby.
2..Dec. 6, 1838. Thomas Graham, Butler, v. Catherine Hay Maxwell.

3..Feb. 14, 1839. Mary Young v. James Bowie, Smith, in Johnstone.
4..Feb. 21, 1839. George Templeton, Carpet Manufacturer, in Ayr, v. Anne Jobbling.
5..March 1, 1839. Eleonora Dawson v. James Heron, Saddler, at Broadlees, Fifeshire.
6..March 7, 1839. William Truefitt, Perfumer, in Edinburgh, v. Anne Hinckley.
7..March 8, 1839. Jn. Allan, Silk Mercer, sometime in Glasgow, v. Jessie Ferrier.
8..March 9, 1839. John Mac Fadyon, jun., Music Seller in Glasgow, v. Matildhe or Matilda Vivian, or De Sauzay.
9..March 9, 1839. Isabella Murray v. Alexander Mac Lauchlan, Labourer, Blainslie, Parish of Melrose.
10..May 22, 1839. Alexander Walker, Journeyman Organ Builder, Edinburgh, v. Jane Watson.
11..May 22, 1839. John McGeorge, Butler, Friar's Carse, v. Mary Nisbett.
12..May 22, 1839. Dionysius Ornufri Marianski, Quill Seller, Glasgow, v. Agnes Mac Pherson.
13..June 25, 1839. Agnes Smith v. Richard Reid, of the Customs, Edinburgh.
14..June 26, 1839. Mary Blair v. William Forrester, Farmer, now abroad.
15. July 2, 1839. Alison Allan v. Duncan Scott, Flesher, in Edinburgh.
16..July 3, 1839. Isabella Watson Dunn v. William Matthews, jun., Leather Merchant, Aberdeen.
17..July 5, 1839. John Boucher, residing in Edinburgh, v. Mary Ann Ferrier.
18..July 5, 1839. James Gale, Ropemaker, in Alloa, v. Margaret Buchanan.
19..July 6, 1839. Alexander Tyffe, Baker, in Dundee, v. Anne Davis.
20..July 11, 1839. Eliz. Burnett v. Robert Ross, Corporal, 78th Regiment.
21..July 11, 1839. Margt. Williamson v. Edward Wrixon, residing in Edinburgh.
22..July 11, 1839. Robt. Gilmour, Park St. Camden Town, v. Helen Anderson.
23..July 11, 1839. Edward H. B. Hughes, 13, Abercromby Place, Edinburgh, v. Maria Mercandotti.

From November, 1839, *till November*, 1840.

1..Nov. 19, 1839. Helen L. Leslie v. William Todd, Apothecary, in Leith.
2..Dec. 12, 1839. William Chalmers, Sergeant, 26th Foot, v. Ann Mac Intyre.
3..Dec. 13, 1839. Richard Fraser, Clothier, Edinburgh, v. Catherine Graham.
4..Dec. 21, 1839. William Nicholls, Merchant, in London, v. Ann Topper.
5..Dec. 21, 1839. Mary Robertson v. Alexander Munnoch, sometime Baker in Bannockburn.
6..Jan. 22, 1840. Mary Ann Lindsay v. Robert Shrivall, Actor in the Theatre Royal, Edinburgh.
7..Jan. 31, 1840. Harriett Jenner v. Robert Crofts, residing in Edinburgh.
8..March 3, 1840. Louisa, Countess of Kintore v. Earl of Kintore.
9..March 10, 1840. Peter Forrester, Journeyman Tinsmith, Dunfermline, v. Isabella Baxter.
10..March 14, 1840. Wm. Mitchell, Tobacco Spinner, Glasgow, v.— Mac Allister.
11..March 19, 1840. Janet Finny Lindsay v. Hugh C. Gunning, residing in Canongate, Edinburgh.
12..March 20, 1840. Letitia Mary Gordon v. Edward Sandeman, sometime Merchant in Leith.
13..June 9, 1840. Sarah Middleton v. John Tod, Spirit Dealer, Edinburgh.
14..June 9, 1840. Ad. Nelson, formerly Grocer, in Dumfries, v. Fras. Fairbrass.
15..June 23, 1840. Robert Hamilton, Shoemaker, in Catrine, v. Mary Rice.

16..June 25, 1840. Robert Wilson, Carrier, Galston, v. Margaret Rowan.
17..June 30, 1840. Daniel Nicol, Shoemaker, Leith, v. Christian Macbeth.
18..July 10, 1840. Harriet More v. John More Robertson, formerly of Brompton.
19..July 11, 1840. Joseph Hunter, Merchant, in Leith, v. Margaret Bell.
20..July 15, 1840. Janet Martin v. David Ferguson, Labourer, Monkton.
21..July 17, 1840. John Rickman, Butler to Lady Maxwell, of Springkell, v. Marion Hamilton.
22..July 18, 1840. Joseph Potts, Mariner, in Port Glasgow, v. Eliza Kennedy.

From November, 1840, *till November*, 1841.

1..Nov. 7, 1840. John Dickson, Wright, Crossgatehall, v. Dickson.
2..Nov. 14, 1840. H. D. Mac Murdo, residing in Glasgow, v. Lockhart.
3..Nov. 17, 1840. Matilda Cameron v. Robert Mac Lean, Dyer, in Glasgow.
4..Jan. 15, 1841. Janet Miller v. Peter Gray, Farm Servant, Bradyetts.
5..Feb. 5, 1841. Thomas Robertson, Farmer, in Lunnaness, v. His wife.
6..Feb. 23, 1841. Daniel King, Surgeon, R. N. Hamilton, v. His wife.
7..March 3, 1841. David Lamont, Overseer, at Netherplace, v. His wife.
8..March 13, 1841. Joseph Mac Call, residing in Lanark, v. His wife.
9..July 3, 1841. Henry Bettie Tollemache, son of the Hon. Chas. Tollemache, v. His wife.
10..July 20, 1841. Hugh Macfarlane, Piano Forte maker, in Glasgow, v. His wife.

J. P. T.

ART. II.—RECENT REFORMS IN CHANCERY.

1. *Statute* 5 & 6 *Victoria, chapter* 103.
2. *General Orders*:—12*th Oct.* 1841; 1*st Nov.* 1841; 11*th Nov.* 1841; 17*th Nov.* 1841; 19*th Nov.* 1841; 10*th Dec.* 1841; 11*th April*, 1842; 8*th July*, 1842; 3*rd Aug.* 1842; 5*th Aug.* 1842; 20*th Oct.* 1842.

In former times, it was a tiresome and most unprofitable task, to mark the sayings and doings on the subject of Chancery Reform. Session after session a long harangue was delivered by some champion of the mercantile or landed interest upon the grievous abuses to which commerce and property were the prey; or the House of Commons was enlivened by the declamation of some lawyer of the common law bar, who hoped to gain distinction in parliament by condemning that part of the profession with which he had the least possible acquaintance. Torrents of abuse were poured upon Lord Eldon, as a judge wavering in his mind, and dilatory in his decisions; and the orator, who had thus seasoned his eloquence with personal attack, and had given vent to an overflowing

tide of patriotic indignation, thought his character established as a chancery reformer.

That seed, sown by husbandmen of this description, should yield no fruit, was an event in conformity with the order of nature. Ex nihilo nihil fit. A different class of labourers was required; fit instruments were to be chosen; and the work was to be undertaken by men, who combined with a sincere wish for improvement all the knowledge and determination and personal and professional influence, which were required for the attainment of their object. Our readers are probably aware, that in the year 1841, the Master of the Rolls, V. C. Wigram, Mr. Pemberton Leigh, and the late Mr. Sutton Sharpe, formed themselves, at the suggestion of Lord Cottenham, into a Commission for the consideration of Reform in Chancery. That these learned persons were well able to discharge the duties which they undertook, will scarcely be disputed by any one, who is acquainted with their characters in the Court.

Lord Cottenham himself commenced the work by his orders of August, 1841. In May, 1842, when we last drew the attention of our readers to the subject, the commission was in active operation. The act of last session, and the orders which have since appeared, are the first fruits of their exertions. Probably the day is far distant, when, in this labour of improvement, any thing that is done will not leave much undone. But the vast mass of property, and the complication of interests, affected by the condition of the court, are a reason why the reform should be a gradual work; and the recent alterations, if fairly considered, assume a very respectable appearance.

Mr. Daniel's pamphlet, on which we formerly made some remarks,[1] was the last effort in favour of the Six Clerks' Office. Indeed it was less like a speech for acquittal, than a remonstrance against immediate execution; and made us imagine, at the time of its publication, that, in the learned author's opinion, nothing remained for the exercise of his talents, except the last sad office of a funeral oration. That the six clerks should survive the speech of Mr. Pemberton Leigh, and Mr. Field's pamphlet, was absolutely impossible. It remained for the condemned officers to consider, not, as heroes

[1] See Law Mag. vol. xxvii. p. 102.

of yore, the most graceful mode of bowing to their fate; but, as cautious and prudent men, in what manner they could so surrender their offices, as to bring upon themselves individually the least possible inconvenience. Indeed, if their merits, as public officers, are to be measured by their success in this particular, their services ought to be secured for all the difficult posts in the state. The statute 5 & 6 Vict. c. 103, teems with compensation. The value of the abolished office is to be ascertained; and the amount of compensation is restricted, by only one limit, viz., *that it is not to exceed the entire value of the office.* We doubt whether there ever was an instance in which public offices were bought up at such enormous sums; and yet we believe that there have been few occasions, on which the bargain made for the public has been more thoroughly excellent. Mr. Pemberton Leigh,[1] after describing the duty performed by the six clerks, as an useless ceremony, adds "that the duties performed by the sworn clerk would seem to be less.

"Si minus esse potest quam quod nihil esse videtur."

Mr. Field,[2] in his very able pamphlet, leaves us with precisely similar impressions as to the amount of assistance brought by these officers to the practice of the court. We all know that expressions, dropped in joke, upon matters of this kind prove that they are founded in truth, when they obtain currency and become proverbial. With this impression we venture to repeat the joke of an eminent leading counsel, "who on perplexing points of practice advised his clients, as their best chance of being right, to ask the opinion of their clerk in court, and act just contrary to his advice."[3] Nor may we pass over as a matter of no import, Mr. Lowe's odd speech before the Chancery Commission, "Mr. Shaddick was a good clerk in court, even when he was a lunatic."[4]

It appears that the six clerks and clerks in court became unnecessary officers, not from any fault of their own, but in consequence of the change of system in the conduct of chancery business. "They formerly acted as solicitors," says

[1] Speech of 5th Aug. 1840, published by Stevens and Norton, p. 18.

[2] Observations of a Solicitor on Defects in the Offices, Practice and System of Costs of the Equity Courts. By Edwin W. Field, 1840.

[3] Ibid. p. 25. [4] Ibid. p. 26.

Mr. Pemberton Leigh, "and by them in that character all the business of the court was conducted." "Within living memory," says Mr. Field, "the clerks in court, formerly sixty or nearly in number, were the chief solicitors of the court." Change of system gradually altered their position, "they ceased to solicit," and confined their attention to that peculiar business, of which, at the time of their extinction, they were invested with the monopoly. From having been the effective solicitors in the transaction of public business, they gradually passed to the discharge of merely nominal duties, and ultimately became clogs upon the wheel to which they formerly supplied the momentum.

We need hardly say of how great importance it was to put an end to the interference of officers of this description in the conduct of chancery proceedings. The more cumbrous the proceedings, the higher the fees, the more inconvenient was this interference. Nor was there any corresponding advantage; for when these officers ceased to be active in the affairs of the Court, they became incapable of giving such advice upon points of practice as could be relied upon, their opinions sank in authority, and their uselessness gave rise to the pleasantries of which we have already produced a specimen.

The question will be asked, why such enormous compensation was to be granted. The answer is found in the tenure of these offices which the public had allowed to be established. They had become the subject of barter and sale, of settlement and of family arrangements. The law had permitted, and had, as it were, guaranteed the system. If it was important to the public that the system should be altered, the expense of the alteration could not fairly be imposed upon those who happened to be in possession of the offices.

Happily there prevails in this country so strong a feeling in favour of vested interests, and of all rights in the nature of property, that, had these officers been deprived of their posts without satisfactory compensation, the event would have raised a general sympathy in their favour, the change would have been condemned as an act of spoliation, and remnants of old mischief must probably have been retained, as a boon to the sufferers. Nor let it be supposed that the hostility of these officers, had they endeavoured in their own defence to thwart

the alterations, would have been by any means a trifling obstacle. We believe it to be good policy to hold out a general expectation that, in reforms of our judicial proceedings, the claims of officers who have interests of a vested character will be duly respected. A feeling of this description converts the opponent of future improvement into an useful and efficient ally. In the projection of a railway a company finds it good policy to prevent opposition by payment of fair prices for the land that is required: and on the same principle, the state facilitates the task of improving the public offices, when it purchases at an adequate value the vested interests which are to be extinguished. In the present instance the result is, that although a great public office connected with every branch of equity proceedings has been utterly destroyed, the introduction of the new system has produced scarcely any perceptible inconvenience. It is well known that many of the persons who acted in that office have been zealous and most efficient promoters of the change; and we cannot but think that, had they taken a different course, and offered opposition instead of giving assistance, the new system, instead of coming smoothly into operation, would have been accompanied with very general embarrassment.

We now proceed to notice the statute 5 & 6 Vict. c. 103, and the recent orders. In doing so, we think it most convenient to advert to these subjects in their chronological arrangement.

The order of 12th October, 1841, was intended to expedite business transferred from the Court of Exchequer to the Court of Chancery, under the 5 Vict. c. 5.

The order of 1st November, 1841, had a similar object in respect of the business in the accountant-general's office.

We need not go at length through the orders of 11th November, 1841. They were issued with a view to divide the list of causes in a proper distribution between the two new Courts. With that view they gave to the plaintiff a power, which we have already taken an opportunity of deprecating,[1] to select the Court in which he wished his cause to be heard.

The object of the orders of the 17th day of November, 1841, is to substitute for the distringas in the Exchequer a similar

[1] Vol. xxvii. p. 103.

process in Chancery. This process is to be founded upon an affidavit, to the effect that the party, on whose behalf the distringas is applied for, is beneficially interested in the stock which is to be the subject of it, and that his interests are in jeopardy. The general bearing of these orders is to place the new Chancery distringas upon the footing upon which the Exchequer distringas formerly stood.

By the order of the 19th day of November, 1841, the first, second, third, fourth and fifth orders of 26th August, 1841, are postponed in their operation till after Easter term, 1842.

The order of 10th December, 1841, merely makes a slight variation in the affidavit, upon which a distringas may be obtained upon the second order of 17th November, 1841.

The orders of 11th April, 1842, are more important. The first of them enables a plaintiff to take a bill pro confesso against a defendant who has absconded; either by service of a proper notice upon the clerk in court, if the defendant has appeared by a clerk in court; or, if the defendant has not appeared by a clerk in court, by inserting a notice in the London Gazette.

By the second order a plaintiff is enabled to procure the appointment of one of the six clerks as guardian to an infant who has not appeared; while on the other hand precautionary steps are directed to be taken, in order that the infant's friends may be informed of every part of the proceedings.

The third order enables a plaintiff, without obtaining any special leave, to serve a defendant with notices of motions and petitions, if no appearance is entered by him during the period allowed for that purpose.

By the fourth order, the orders of August, 1841, which, by the order of 19th November, 1841, were suspended till after Easter term, are suspended till further order. The substance of these orders is embodied in orders issued on the 26th day of October, 1842.

The twenty-second order of 26th August, 1841, is suspended by the fifth order till further order.

The orders sixth, tenth, eleventh, twelfth, and forty-seventh, are amendments upon the orders corresponding in numbers of the 26th day of August, 1841. Orders tenth, eleventh, and twelfth restore the old process by attachment; in other respects

they make very trifling alterations. Order forty-seventh preserves a creditor from the expense of taxation, where the master, before whom his debt is proved, is able to ascertain the costs due to him in a summary manner.

The order of 8th July, 1842, provides for the payment of income tax out of property which is in the custody of the accountant-general.

The order of 5th August 1842, extends the fifteenth order of 5th May, 1837. It enables either of the new Vice-Chancellors to hear special applications at times when there are no public sittings of the Court of Chancery, without causing a transfer of the cause, in which such an application is heard, into his own Court. The judges in equity, before the creation of the new Vice-Chancellors, were allowed to hear these applications, as sitting for one another. A similar power has thus been extended to the new judges.

We have now mentioned all the orders which were issued before the passing of the late act.[1] Of this act the general purview, so far as it requires a notice in this article, has been to abolish the offices of clerks of enrolment and their deputies, of comptrollers of the hanaper, of six clerks, of waiting clerks, of riding clerks, and of sworn clerks; and to substitute in their places officers who are respectively entitled "clerks of enrolment in chancery," "clerks of records and writs," and "taxing masters;" and to throw upon solicitors a considerable portion of the duties which formerly were performed by the public officers.

The following table has been prepared for the purpose of bringing within the compass of immediate observation the transfer of duties which has been effected by the statute. The new officers are mentioned under the first head. Under the second the old officers, whose places have been abolished, are placed in a line corresponding with the names of the new officers who have taken their places. The duties which have thus changed hands are now to be performed partly by the new officers of the Court, partly by the solicitors of parties. These duties are placed under the third head, connected with the titles of the officers who formerly discharged them.

[1] 5 & 6 Vict. c. 103.

NEW OFFICES, under 5 & 6 Vict. c. 103.	OFFICES ABOLISHED.	DUTIES OF OFFICES ABOLISHED.
Clerk of Enrolments in Chancery	Clerks of Enrolment .. Deputies ..... Six Clerks	Management of enrolments.—To examine and sign documents of decrees and dismissions prepared for enrolment.—To see that the records and orders be duly filed and entered, and to certify them previously to the presentation of the dockets to the Lord Chancellor, to the Master of the Rolls, or the Vice-Chancellor, for signature.—To prepare exemplifications of such proceedings.
	Comptroller of the Hanaper	To check the clerks of the Hanaper.—To enrol warrants for grants which pass the Great Seal. These clerks used in ancient times to receive fines upon writs issued out of Chancery, and to collect the fines paid upon such writs. The business is common law business, incidental to Chancery as the officina brevium.
	Riding Clerk	To keep books as to grants which pass the Great Seal.
Clerks of the Petty Bag ..	Six Clerks as to Petty Bag	Nominal attornies for causes in the Petty Bag.
Clerks of Records and Writs	Six Clerks	Management of records, writs, and rules of Court.—To receive and file all bills, answers, replications, pleas, and demurrers.—To sign all copies of pleadings made by the sworn clerk.—To present to the Lord Chancellor or Master of the Rolls all causes ready for hearing at the end of each term.—To attend at Westminster Hall in term time, and to read documents of record which are required to be read in causes.—To take care of the records by means of a clerk.
	Sworn Clerks, or Clerks in Court	To make out all writs special and common, and all process except subpœnas.—To enter all pleadings, and to present them for filing to the six clerks.—To prepare and to get signed by six clerks all certificates required of the state of proceedings in any suit.—To make office copies of proceedings or pleadings required by solicitors.—To enter with the register all rules to produce witnesses and pass publication, and all appearances and consents.—To have custody of documents deposited in a cause.—To sign all petitions for rehearing and of appeal, and to undertake on behalf of their respective clients to pay such costs as the Court shall award.—To sign consents to petitions, and all agreements or elections to proceed at law or in equity.—To have custody of records of all bills, to which appearances are entered, until answers are filed, or until it is time to transmit them to the record-room.—To give advice on matters of practice.—To keep books in which are entered names of cases and of clerks in court employed in them.
	Waiting Clerks	These offices differ from clerks in court only in some regulations as to their admission into full practice.
Taxing Masters.....	Clerks in Court..... Masters	To attend masters in Chancery upon taxation of costs.—To tax costs of procession suits or otherwise, under orders of the Court.—To tax bills of solicitors delivered to their clients, when referred for taxation, under 2 Geo. 2, c. 23.—To tax bills of solicitors for business in bankruptcy matters, 5 Geo. 2, c. 30.

It is right to observe that under three special sections of the act (the 22nd, 31st and 32nd,) powers are given to the Lord Chancellor in concert with the other judges of the court to issue any orders which may be necessary for the purpose of carrying the act into execution, as to the general course of practice, and particularly as to the fees to be received. Under this authority the orders, which remain to be noticed, were issued on the 26th of October, 1842.

The first of these orders provides for the taking of acknowledgments, affidavits and affirmations on the enrolments of documents in Chancery; the second for the collection of fees, in cases in which fees were heretofore received by the holders of the abolished offices.

By the 3rd, 4th, 5th, 6th, 7th and 8th orders, the duties of the clerk of records and writs are specially pointed out; arrangements are made for the sealing of writs, for the taking security for costs by their officers, and for the taking of oaths and affirmations in certain parts of proceedings in Chancery, both by these officers, and also by the clerk of inrolments in Chancery.

The orders from the 9th to the 15th inclusive provide for the performance of the duties of taxing masters. Their general effect is to throw upon these masters the taxation of all costs whatsoever, both of those which were formerly taxed by the clerks in court, and also of those which were formerly taxed by the masters in Chancery. Powers required for the proper performance of this duty, for the examination of parties and witnesses, for the production and inspection of documents, and for the mutual assistance of the masters, are conferred by these orders.

The next class of the orders, that is from the 16th to the 26th inclusive, are of the utmost importance. It will be recollected that the five first orders of August 1841, were framed for the purpose of transferring a large portion of the business transacted by the clerks in court to the parties in the suit, or their solicitors. This portion of the business appears to have been selected, upon the principle of taking from the clerks in court all the work which they performed as agents for the parties, and of leaving in their hands all the duties which they executed as servants of the court. We have no

doubt that Lord Cottenham prepared this arrangement as a preliminary to the abolition of the office of six clerk. That office having been abolished before the issue of the late orders, Lord Lyndhurst has been enabled to make a further improvement upon the suspended orders of Lord Cottenham, and to bring the new system at once into complete operation.

The 16th order throws upon the parties or their solicitors the performance of all those duties "heretofore performed by the sworn clerks and waiting clerks, as attorneys, solicitors or agents of the parties," in relation to particular matters. It is worth while to mention those matters at length.

"The making out of writs.—The serving and being served with writs, notices, orders, warrants, rules, and other documents, proceedings and written communications, in causes and matters depending in court.—The signing of elections and agreements to proceed at law or in equity.—The signing of petitions of rehearing and appeal.—The entering of appearances and consents with the registrar.—The signing of consents to petitions.—The tender and acceptance of costs.—The joining in commission and striking of commissioners' names.—The signing of notices by paupers.—And all other duties heretofore performed by the sworn clerks and waiting clerks as attornies, solicitors or agents of the parties, in suits or matters in equity."

Under these orders, solicitors or parties acting in person are required to state their places of business or residences or their addresses for service upon every writ which they sue out, and upon every information, bill, demurrer, plea, answer, in short upon almost all proceedings. Such service as need not be personal will be sufficiently made, if the document to be served is left at the place of residence, business or address. To prevent inconvenience arising from distance, this place must be situate within three miles of the office of the clerks of records and writs. By the 23rd, 24th, and 26th orders, notice is to be given to the opposite party, or to his solicitor, of different steps taken in the cause; by the 25th, solicitors signing certain proceedings, heretofore signed by the sworn clerk, are to be subject to the same liabilities which the signature of the sworn clerk formerly brought upon him.

It will be seen, upon the most cursory view of these orders;

that they make very great alterations; yet in substance they only bring the proceedings into conformity with the practice of very ancient times. The sworn clerk was formerly the solicitor of the suitor. Between him and the suitor there was no intervening agent. Gradually the custom grew up of employing a private agent, a solicitor, as well as a public agent, the sworn clerk. The ancient usage of a single agency is now restored; but the new practice will so far differ from the old, that the agent employed will not be a public officer, invested with a monopoly of his peculiar duties, but a private agent, a solicitor, whom the party has selected for himself, according to his own estimate of trustworthiness and ability. Probably the clerks in court, when they first observed the employment of private agents, thought the change highly advantageous, as calculated to relieve them from troublesome and laborious duties. They little thought that the new functionary would supersede the old one, and that in allowing the private portions of their duties to escape from their hands, they were paving a way to the annihilation of their public offices.

The 27th and 28th orders point out the mode which will now be followed in the selection of guardians ad litem for infant defendants, and for persons of unsound mind. Duties to be discharged upon these subjects, which have hitherto fallen upon six clerks, are now transferred to solicitors.

The 29th order enables clerks of affidavits to take affidavits and affirmations.

It is quite unnecessary to trace the alterations in former orders, effected by the 30th and 31st orders. With regard to the 32nd and 33rd, the only point of importance is, that the fees directed to be taken by public officers are now to be carried to one common account, called the "suitors' fee-fund account." Of the consequence of this rule we shall presently have occasion to speak at some length.

The remaining orders consist of schedules of fees, which are hereafter to be paid to the clerk of inrolment, the clerk of records and writs, the taxing masters, the clerk of affidavits, the clerk of the masters in ordinary, and to solicitors.

Respecting the propriety of these fees great difference of opinion has been entertained; and from all that we have heard

and read, we think that the mode in which the members of the Commission have dealt with them has been very much misrepresented. Let us recollect, in the first instance, the precise footing upon which the subject was brought before them. It was conceded, almost universally, that the six clerks and clerks in court, being deprived of offices, in which they had a vested interest, were entitled to compensation. By whom then was the compensation to be paid? The reasonable answer would surely be found, by considering under whose authority these officers had acquired a vested interest. It would appear to be due and consistent, that the same power which permitted, we may say caused, the creation of the claim, should provide the means by which it was to be satisfied. These offices, as we have already intimated, became the subject of contract under the authority of the legislature. They were in no way created by the suitor; but they were his grievous misfortune, the impediment to all his efforts, the heavy tax upon his pecuniary resources. Yet, because he has endured the evil so long, the legislature, who were the party really in fault, who, in paying the price of these offices, would merely be paying the penalty of their own negligence, have imposed the burden upon the suitor during the lives of a whole generation.

The history of our constitution is certainly in our favour, when we say that this burden should be paid by the nation. The great practical reform, by which feudal monarchs first shook the power of the barons, was the introduction of royal courts, held at fixed places, at stated seasons, and presided over by eminent judges. Judicatories of this character,[1] supported by successive sovereigns, gradually became the objects of public confidence and veneration, superseded the baronial jurisdictions, and taught the nation to lean upon the monarch as guardian and protector against baronial usurpation. St. Louis was judge in person. "I have often seen the saint," says Joinville, "sit under the shade of an oak in the wood of Vincennes, when all who had any complaint freely approached him. At other times he gave orders to spread the carpet in a garden, and seating himself upon it, heard the causes that were brought before him."[2] In Scotland the usurpations of

[1] Robertson's Charles V. vol. i. sect. 1, § 5.
[2] Robertson, ibid. Proofs, note xxiii.

the nobility were peculiarly exorbitant, and were checked upon a similar principle, by the institution of royal courts. "The same expedients," says Robertson,[1] "were employed to circumscribe or abolish the dangerous jurisdictions of the English nobility. William the Conqueror established a constant Court in the hall of his palace; from which the four Courts, now intrusted with the administration of justice in England, took their rise. Henry II. divided his kingdom into six circuits, and sent itinerant judges to hold their Courts in them at stated seasons." "The privileges of the counties palatine were gradually limited; with respect to some points they were abolished, and the administration of justice was brought into the King's Courts, or before judges of his appointment."

Is it not palpable to every reader of constitutional history, that this struggle for superiority, maintained between feudal king and feudal baron by outbidding each other in the advantage of their respective Courts, must have been carried on without taxation to the suitor? Again, why have the judges received their salaries out of the civil list? Why has the payment of those salaries been proclaimed to be "for the honour and dignity of the crown?"[2] Surely, because the principle of our history has uniformly been, that, while the suitor pays the costs of work done for himself individually, the person to whom the Court belongs, whether monarch or baron, has himself defrayed the public expenses.

Look then at the true character of these compensations. The officers of the Court are agents of the judges; they perform certain portions of the judicial functions. The compensations are the price paid for the establishment of these judicial agents upon a proper footing. They are a portion of the general expence of the Court. They are in their character precisely similar to the payment of the judges themselves. They are therefore a part of a burden, which, according to old constitutional principles, the sovereign or the nation ought to bear.

Another ground for exempting the suitor from the imposition of this payment is found in the peculiar character of our

[1] Robertson's Charles V. Proofs, note xxiii. [2] See 1 Geo. 4.

law. Under a system, in which all law is comprised within a code, a suitor may be said to maintain his suit, and to obtain a decision of the point in dispute, exclusively for his own benefit. Any other person, who may be affected by a similar question, may clear up his doubts by reference to the code, quite independently of the new decision. Thus the suitor has not by his suit been party to any species of legislation, or to any proceeding which is of direct public utility. The characteristics of our jurisprudence are quite different. Of course it is well understood, that in criminal matters proceedings take place quite independently of the advantage or disadvantage of the prosecutor, and merely for the public good. Nor could any legislator, however penurious, derive from any, except a public fund, the sums required for the payment of criminal judges and their officers. In truth the same principle may be applied in a very great measure to all our other Courts. A large portion of our civil proceedings are carried on for public benefit. Our Courts are a workshop[1] for legislation, as much as for the adjustment of private differences. Look at the great landmarks of our law, for instance: the construction of the Statute of Uses;[2] the barring of entails;[3] our commercial law as established by Lord Mansfield; our system of equity as created by Lord Nottingham and Lord Macclesfield, and brought to maturity by Lord Hardwicke and Lord Eldon: are not all the decisions, by which our law has been settled upon these subjects, as much in the nature of legislation as acts of parliament? Are they not as much enactments for the benefit of the whole community, as decisions of particular questions for the benefit of the suitor? Or look at more modern cases, Loveridge *v.* Cooper,[4] and Dearle v. Hall, in which the effect of notice in equitable choses in action was ascertained; Tullett v. Armstrong,[5] Scarborough v. Boman,

[1] So completely is this doctrine of judicial legislation recognised, that we find it mentioned in the House of Lords as a mode of settling an intricate question more advantageous than acts of parliament. "I wish my noble and learned friend," says Lord Wynford, "to accomplish his object of reconciling the laws of Scotland and England in similar cases to this; but I am afraid that he will find very great difficulties in his way. *I cannot help thinking that it might be better settled by different decisions as the matters arise, rather than by act of parliament. I do not think that the legislature is well adapted to take up and settle a very difficult question like this.*" Doe d. Birtwhistle v. Vardill, 1 West, 519.

[2] 2 Black. Com. 336; Atk. 591.

[3] Taltarum's Case, Ed. 4.

[4] 3 Russ.

[5] 4 M. & C.

which determined some of the rights of married women as to separate estate; or Baring v. Corrie,[1] in which some of the limits to a factor's authority were defined. Innumerable other cases may be quoted, which, like these, are so many instances of judicial legislation. It is true, that there are numerous decisions of another character, consisting merely in the application of rules and principles, already laid down, to the facts of each particular case. Yet even these decisions are not without advantage to the public, as they serve for the illustration and more complete explanation of the definite rules and principles.

Courts then in which proceedings of this nature are carried on, labour for the public as much as for private advantage. We might as well inflict the parliamentary expenses of a session upon all persons who present petitions for acts of parliament, as compel the suitor to pay for the Courts in which his cause is decided. Indeed, the common language of every day claims the Court as a tribunal belonging to the sovereign or the nation; and the time which is there consumed as the public time. But how can terms of this nature be properly applied, if the expense of the Court is to be borne by the suitor? If such is to be the case, the Court of Chancery should be styled, not her Majesty's, but the Suitors' High Court of Chancery. Complaint should be made for the improper occupation, not of the public, but of the suitor's time. If such a law is to be enforced, the commonly received expressions are merely idle sounds, or phrases of palpable misrepresentation.

This question deserves still further discussion. It rests upon considerations which are equally independent of constitutional history and of the peculiarities of English jurisprudence. Next to the integrity of our ecclesiastical institutions, the paramount object of public interest is the due administration of justice. When a suitor obtains his right, great as his individual benefit may be, it is as nothing, compared with the wholesome feelings engendered in the public mind. Each instance that occurs is a fresh warning and assurance to every subject of the realm, that no man shall be deprived of the fruits of his industry, that no man shall remove his neighbour's landmark, that property shall be secured, and right respected and enforced. The upright execution of justice is one great boon

[1] 2 B. & A. 137.

granted by the sovereign to the subject in return for allegiance. Secure of this national blessing, all classes of the community acquiesce in the privations and drawbacks, which are incident to their several fortunes, and imbibe a spirit of loyalty, and a love of tranquillity and peace. But if this confidence is once extinguished, violent and headstrong men will expect to build their fortunes upon the wreck of the constituted authorities, the advocates of order will be deprived of all motive for resistance, and the floodgates of anarchy will be opened. Looking back to the events of the French revolution, we find ample grounds for believing, that, if the Courts of justice had continued faithful to their duties, neither the weakness of the monarch, nor the profligacy of the nobility, nor all the errors or follies of the minister, could have goaded the nation into the atrocities of civil war. The climax of evil was justice contaminated at her source, when injuries found no redress, except in violence and outrage:

> "Hoc fonte derivata clades
> In patriam populumque fluxit."

Such being the national importance of the pure administration of justice, how can it be honestly alleged, that individual cases are decided, or that judicial officers perform their duties, for the benefit of individual parties rather than of the entire nation? How can the salaries of those officers be otherwise regarded than as payments made for the necessities of the state? How can the legislature, which has imposed this public burden upon private persons, be exempt from the charge of grievous injustice? The Court of Chancery is emphatically the Court of the Sovereign. The improvements there effected are national improvements. It is a principle of every year's legislation that private individuals shall not pay the price of public improvement. Yet the salaries of our new Vice-Chancellors are paid by the suitor; and again the suitor is compelled to pay the price of these recent alterations.

We are not without hope that, when the glaring injustice of such a principle becomes universally understood, this burden will be transferred to the public. The increase of fees, imposed for the purpose of meeting it, will then be abolished. For the present they cast an ill-deserved suspicion upon our recent reforms: they tend to deter every subject of the realm from

the due maintenance of his rights: they weigh him down, when he enters the forum, and throw a general discredit upon the administration of justice.

This very great evil results from no fault on the part of the commission. The new table of fees was to be constructed by them upon the principle of providing the sums required for the alteration of the system. Indeed the government determined that the alterations, if made at all, should be made at the suitor's expense. For this most improper determination the authorities of the Treasury, not those of the law, are responsible. One of two alternatives was to be encountered; submission to this injustice, or the abandonment of the work of reform. Had the latter been preferred, the Lords of the Treasury would have incurred a still deeper responsibility, arising from their false economy. But the commission saw clearly that the suitors would be gainers by the alteration, even although they paid the price, which justly lay with the public. The task which they undertook was not that of determining what the aggregate amount of fees should be; for the Treasury had already fixed that amount by deciding that it should meet the whole expense of compensation. The commission were merely to determine the best mode of raising the amount thus previously ascertained, on what parts of Chancery proceedings it should be imposed, and how it could be most advantageously distributed amongst the different classes of suitors. It must not be supposed that this task was carelessly performed. We well know that professional men of all shades in politics, and of all branches of the profession were consulted; and we think that the new scale of fees bears internal evidence of considerable care in preparation. If however we fancied that there was ground of complaint, we should have thought that inquiry could easily be satisfied, and that, upon a question being put in either house of parliament, a full explanation could be given of the principles upon which the adjustment of fees has been effected.

By the abolition of the term-fee, of which the aggregate proceeds have been calculated at sums varying from 15,000*l.* to 20,000*l.*, a large deficiency was at once produced. Had the compensation been borne by the public, the benefit of this

abolition would have accrued to the suitor. But, as the payment of these compensations was imposed upon the suitor, the commission were compelled to provide some payments *in substitution* of the sum which was thus relinquished.

The principles upon which the commissioners proceed, will appear in the consideration of the items, upon which the substituted income is to be raised.

In the first place there are numerous slight alterations, in which broken parts of silver coin, as 6*s.* 8*d.*, 7*s.* 8*d.*, and 13*s.* 4*d.*, have been respectively altered to sums of 7*s.*, 8*s.*, and 14*s.* These alterations increase expense to an amount, which is not worth consideration; but they facilitate the collection of the items; a matter of no small importance in a public office, where the items to be collected are numerous and small.

Upon the fee for the filing of every bill or information there is a large increase; from 7*s.* to 1*l.* Also upon the fee for the filing of a plea, answer, or demurrer, from 3*s.* 4*d.* to 10*s.*, and upon the filing of every replication from 7*s.* 8*d.* to 10*s.* These are some of the most material items of increase. Now these are the stages of the proceedings, in which, as it appears to us, a large proportion of the necessary increase is properly imposed. For these are proceedings, which must be taken by all suitors; so that payments in respect of them are payments in which all suitors are obliged to participate.

In respect of writs, if the payments to the solicitor under schedule 6 are combined with payments to the court in schedule 2, there is an increase of expense in each instance. But in reality the item is unimportant. We believe that before the recent changes, the proceeds of writs did not amount to above a thirtieth part of the entire revenue collected; already the number of writs required has been greatly reduced, and there is, we understand, a prospect of still further reduction. The other material items of increase are the copy-money, and the per-centage on taxation of bills of costs. Of the copy-money, which is 4*d.* per folio, 1½*d.* is the old payment, which will still go to a junior clerk, and 2½*d.* is the amount of increase. Nor is the per-centage upon taxation altogether an addition of 4*l.* per cent. upon the bills; for the clerk in court has always attended the meetings for taxation,

and has received 6*s.* 8*d.* for each meeting. Of course this fee is now abolished: the amount which it annually yielded is a large set-off against the amount which will now be levied. The propriety of selecting these two subjects with a view to revenue is founded upon advantages of much the same description. The burden falls in fair proportion upon the different parties to the suit, plaintiffs as well as defendants. It falls upon every party in tolerably fair proportion to the business transacted on his behalf. And the payment is demanded, generally speaking, at a time when the proceedings are drawing to a close, when the property, which is the subject of suit, is to be realized, and all accounts are to be forthwith wound up between the court, the lawyer, and the client.

We have spoken of this part of the subject in the most general terms, not because it is a very dry point, for we know that it is one of the greatest interest to many of our readers; but because the duty to be performed by the commission was one of so limited a character. It is not pretended, that the fees now to be collected will produce a revenue exceeding the proceeds of the old fees. The commission, with a view to the payment of the compensation, were to ensure the collection of as large a revenue as before, but no larger. Their work was, as we have observed already, a mere work of *substitution.* The term fee of the clerk in court was abolished. Numerous proceedings, and all the fees incident to them, were suppressed. The commission was to provide, in lieu of the income thus surrendered, an increase of income upon the proceedings which were left in activity; and we are fully convinced, that, in taxing those parts of the proceedings which all suitors are equally obliged to take; in proportioning the amount of payment as nearly as possible to the amount of business done; in facilitating the collection of numerous trifling items, and throwing a considerable part of the payments to be made upon the concluding operations of the suit, they have made a judicious and wise distribution of the burden, which the Government, through a false economy, have compelled them to impose.

If we wish to put a fair estimate upon the alterations, which have been effected in the administration of Equity, we must

remember the conditions of our courts at the commencement of the year 1841. We had then the Equity Court of Exchequer, sitting but a small number of days in the year, where common law judges were required to combine sittings in equity with their ordinary business, and to decide cases, just as difficult as any cases in the Court of Chancery, upon principles, with which they had necessarily but a very partial acquaintance. The rules of practice in that court differed from the rules of practice in Chancery; the differences were great in some particulars, in others they were minute; and, perhaps, through their very minuteness were only the more likely to draw practitioners into error. There was no certain authority upon the practice. A point was often decided just as it struck the judge at the moment, or upon the hints collected in a short conversation with the registrar. We speak of the system, from which the mischief was inseparable. We have the highest respect for the very learned person who latterly presided in that court. Indeed when we watched Baron Alderson in the discharge of his duties, and observed his vast knowledge, his unweared assiduity, and the penetrating powers of his intellect, and then compared the reputation of the court over which he presided with his pre-eminence as a judge at common law, we only became the more convinced how dangerous it is to appoint a common-lawyer to be judge in a Court of Equity.

In reverting then to the events of the last two years, the first improvement which commands attention, is the extinction of that strange anomaly, the Equity Court of Exchequer. We shall next recollect further, that at the period to which we refer we had only three branches of the Court of Chancery, that this court was overwhelmed by arrears, and that the accumulation had for many years past shown a constant increase at the commencement of every successive long vacation. We have now five branches of the Courts of Chancery. The two new judges are men of long experience in the equity practice, and with their assistance the arrears of business have been reduced almost to nothing. Why this alteration did not take place in 1840 instead of a delay till 1841, is a mystery which has never been explained, at least to the public. "I believe," said Mr. Pemberton Leigh, in his speech[1] on the

[1] p. 4.

Chancery Bill, in 1840, "Lord Lyndhurst recommended the select committee, for the very purpose of laying before parliament a body of evidence, which should convince all men of the necessity of abolishing the equity branch of the Exchequer, and giving additional judicial power to the Court of Chancery—and after a most complete body of testimony had been produced—after, by means of it, opposition had been silenced, when no serious difficulties any longer remained, her Majesty's ministers in this house, apparently in mere wantonness, threw up the bill. Surely some explanation is demanded, why ministers suffered themselves to be scared from a measure, which they themselves admit to have been so important, by a mere shadow of opposition, a mere threat of a speech, not against the bill, but on matters connected with it, by my right honourable colleague."—"Why then I ask was the bill thrown aside? Is a measure unworthy of the support of the Government, if it has *only* the recommendation of being of the utmost importance to the well-being of the people?"

If the reason generally supposed was the real reason, that is, if the postponement of the measure arose from Lord Cottenham's inflexible determination not to allow a common lawyer to fill the post of Vice-Chancellor, to avoid the mistakes and confusion, and unceasing appeals, and all the other elements of a bad administration of justice, which he anticipated as the result of such an appointment, we think that that noble and learned lord has earned abundant gratitude from every lawyer, and still more from every suitor, who is connected with the Court of Chancery. For our parts we have no idea that a successful attempt could have been made to reduce the arrears of judicial business, if the two new judges had not been men thoroughly acquainted with the practice of the Court of Chancery.

The destruction of the Equity Court of Exchequer, as compared with that of the six clerks' office, was an easy task. That court had long previously been condemned in public opinion as a mischievous anomaly. On the contrary the six clerks' office had in very recent times received the approbation of high authority. The Chancery Commission of 1826 made a report in its favour, which Mr. Field[1] quotes in his

[1] p. 23.

pamphlet. "We are satisfied from the evidence before us, that no material delay, and a very trifling expense, arises from the intervention of the clerks in court; and we believe that the existence of these officers does tend to secure a degree of regularity and uniformity of practice, which, considering the great extent and the variety of the business of the Court of Chancery, could not be obtained without them. Upon the whole, we see no sufficient ground for any alteration respecting them, except that by one of our propositions we suggest, that the fee charged for an attendance in the court, which never takes place, ought to be abolished."

In spite of this high commendation, the venerable evil is defunct. Root and branch, the whole is extirpated; and now, when the new plant has put forth its branches, we wonder that the worn-out predecessor was permitted for so long a season to cumber the ground. Bills are filed, answers are put in, notices given, motions made, petitions signed, decrees ordered; yet we are not aware that any of the proceedings have been conducted one whit the less easily, or the less satisfactorily, because the aid, or the obstacle, (whichever term may seem to be the more appropriate,) of the six clerks' office has been removed. The history of this reform, effected in spite of the report of 1826, will serve as signal encouragement to law reformers. It shews them that parts of our system, which are really mischievous, will yield to repeated and persevering attack, although they may be defended by a rampart of powerful authority.

In addition to these two vast improvements, numerous changes have been effected, which taken separately are minute, but taken altogether are an immense alteration in the court's practice. The number of parties in cases of numerous obligees, and also in many cases for execution of trusts and for the sale of trust estates, has been diminished. The steps in process have been curtailed. By the leave to serve parties with copies of a bill, instead of bringing them regularly before the court, records have been shortened, and parties substantially interested have been enabled to carry out the several proceedings of their suit without the expense and embarrassment of numerous formal appearances. The obligation to interrogate to matter which is to be answered,

has destroyed the old trap for insufficiency; while the specification of those interrogatories, which each defendant is to answer, shortens pleadings, and tends to make the positions of different parties in a suit plain and intelligible. A further curtailment of unnecessary proceedings is found in the abolition of the decree nisi. We do not wish to enter into any discussion upon the new orders in lunacy; but we may allude to them so far as to observe, that they have rendered unnecessary a large number of applications,[1] as to the heirs, next of kin, fortune or situation of lunatic, his maintenance past or future, committeeship and the management of his property. Those of our readers, who are acquainted with courts of equity, will at once see that these numerous changes upon individual points have worked as complete a revolution in the practice, as the two more ostensible measures of the suppresssion of the Equity Court of Exchequer, and the abolition of the six clerk's office.

We believe that we have now given a correct statement of the recent alterations in the Court of Chancery. We are not aware that in any one respect the alteration effected has failed to be a very great improvement. The public are very deeply indebted to the members of the commission, with whom the superintendence and responsibility of the work has mainly rested. It is almost superflous to add, that a large portion of the work has been accomplished by the co-operation of many other persons, who, while they have occupied less prominent positions, are no less deserving of public gratitude and reward. The greater credit is due to the different labourers in this work, as it was one which could be entrusted only to men of learning and experience; to men, whose time was of infinite value to themselves, and was already occupied with other important pursuits. Such are the persons, who have departed from the usual routine of their profession, and have devoted the exercise of their best abilities, to the promotion of this great public object.

It is a natural inquiry, what effect these alterations will produce upon the different classes of persons who are immediately concerned in them? Mr. Field[2] suggests the principle which appears to have influenced our Chancery reformers. It

[1] G. O. 27 Oct. 1842, 10 &c. [2] p. 3.

must indeed be the universal opinion of all persons who understand the subject, that to remove useless technicalities, to lessen the amount of formal matter, to simplify practice, and to expedite the struggle between the elements of law and fact, which come to the aid of the conflicting parties, are modes of improvement in which all classes, judge, counsel, solicitor, and suitor, have one common, undeniable interest. Through changes, founded upon this principle, the study of the law becomes disembarrassed of much unprofitable toil, rights of parties are rescued from chicanery and oppression, while the administration of justice assumes a more intelligible shape, and produces far more satisfactory results.

We would not then have it for one instant supposed, that we desire to see the renewal of any one of those useless proceedings which have been most properly abolished. But in considering how chancery lawyers are affected by these changes, one peculiar effect must not be overlooked. Many of the most severe parts of a lawyer's labours in Chancery have been inadequately remunerated. A compensation has, however, been hitherto found in the formal proceedings, which have been overpaid to an absurd extent. This system of compensation has always appeared to us extremely bad. Plenty of work, and plenty of pay; or no work, and no pay: such is the footing upon which we think the remuneration of lawyers ought to be regulated. By the recent alterations, much of the formal work has been abolished, while the true mental exertion continues as great as ever. The light business with fees comparatively heavy is removed; there remains the heavy business, with fees comparatively light. Our strong impression is, that some alteration in fees ought now to be made, not as a compensation for the profitable business which has been most properly abandoned, but with a view to an adequate remuneration for true professional toil.

One other incident to these alterations deserves particular notice. It has been a very general system for solicitors to run in debt to their clerk in court, and to carry on suits upon the credit of three or four years. The fees will now go to a public account. They must be paid at once. There is an end to the system of credit. We are sure that the operation of this rule

will ultimately prove of the greatest advantage to all respectable solicitors. A system, by which men without capital are intrusted with such important interests as solicitors are required to protect, is one fraught with danger, and sometimes productive of temptations, which ordinary men find it difficult to resist. It is far safer, that men of no property be discouraged from incurring the responsibility of a solicitor. One consequence which we anticipate from the impossibility of carrying on a suit upon credit is, that the profession will be relieved of many members who ought never to have been admitted into it; and that those, whose means are adequate to the discharge of their duties, will find their hands strengthened, and their practice increased. Still there are cases in which credit is very desirable, and in which the solicitor is almost the only person by whom it is likely to be allowed; cases, for instance, in which a pauper is contending for a fund, perhaps already in Court, and is certain to succeed by perseverance. Probably few persons besides the solicitor are aware of this certainty of success, or can be convinced that, in advancing the funds requisite for the proceedings, they have any fair prospect of repayment. If, in a case of such absolute necessity, the solicitor gives credit, he ought in one shape or another to receive remuneration. Some persons will think that the remuneration will be best given indirectly upon some other ostensible ground. We admit that there are objections to the proposal, that the solicitor be allowed to charge interest upon his advances, nor have we either time or space for entering into the question. But we throw it out for consideration, whether solicitors should not be always required to state their account to their clients at least once in the year, and, under some particular circumstances, to be allowed, on proof of compliance with this condition, to charge interest upon necessary advances.

Our subject now brings us to the suitor himself. The suitors are the class of persons, who will be peculiarly the gainers by the diminution of the system of credit. The frequent memento of the solicitor's bill will be a check to vexatious litigation, and a strong inducement in bonâ fide struggles to a fair and honourable compromise. Many men will buy law improperly, as they will buy horses and clothes unnecessarily, if the day of payment be postponed. But the

sad reality of the solicitor's bill will cool the courage of many an adventurer, and we hope and expect, that by virtue of this salutary warning an end will be put to many of those anxieties and heart-burnings, by which the lovers of litigation embitter the lives and impair the fortunes of their unhappy opponents. One other effect will, we trust, be produced, that suitors will pay more personal attention to the proceedings in their own causes.[1] There are parts of a suit in which there can be no guarantee for due activity, unless the suitor will attend to his own interests. On particular occasions proceedings are taken, which, if his eye were constantly superintending, might safely be avoided. We may add, that there are moments, in which a suitor, watching events with all the keenness of self-interest, may find an opportunity of quickly obtaining by negociation objects which come tardily by the ordinary process of litigation.

With respect to the amount of fees, the suitor of the present day will gain little by the present alterations, because he is compelled to bear the burden of the compensation. But suitors, viewed as a class, or a corporation, have gained the precise difference between an estate for life and a fee simple. As the persons compensated die, the sums to be raised will become less; and the fees imposed to meet those sums will be reduced, so that the suitor of to-day has lost nothing by the change; the suitor of the next generation will derive abundant advantages.

We here close our observations upon the labours of the Chancery Commission. There is however one other subject, to which, if we did not advert, we should not be doing justice to the feelings of many of our readers, certainly not to our own: we mean the death of Mr. Sutton Sharpe, one of the members of the Commission. When a lawyer has made his way into the lead of one of the branches of the Court of Chancery, he has become a person of some public importance. The transaction of the business in Court is very much affected by the nature of his abilities; and, if he is a person of high feeling and masculine character, his influence is of great avail in regulating the tone and temper of the Court. Such was the position of Mr. Sutton Sharpe at the time of his death. He was the undisputed leader of Vice Chancellor Wigram's Court. His knowledge of his profession in pleading, practice, and prin-

[1] See Law Mag. vol. 27, p. 111.

ciple, was very extensive. He had acquired the power of making his statements with clearness and simplicity, and of conducting his arguments with ingenuity and precision. Besides these merits, he was a man in whom a long course of uninterrupted success produced neither vanity nor affectation. He never made a parade of his learning, nor endeavoured to crush an adversary by the superior weight of his abilities. Above all, he had an integrity and uprightness of mind, which made him clear and straightforward in the transaction of business, and utterly averse to any step, however advantageous at the moment, which was in the slightest degree tinctured with unfairness. In consultation, he was always ready to discuss with lawyers far inferior to himself every branch of his case; in court, he had a manner so mild and a tone and language so free from offence, as to command the good-will of every one that heard him. His strong understanding and ready judgment guided him to the proper course under all circumstances, and enabled him to give the most useful advice to other men, whatever might be the difficulties under which he was consulted.

But it was not merely as a good English lawyer, that Mr. Sharpe was well fitted to take a lead in his profession. He had a competent knowledge of foreign law, as well as an extensive acquaintance with foreign advocates. There is no doubt that, if his life had been spared, he would have turned this knowledge of jurisprudence to public benefit. Indeed it is hard to conjecture the full extent of the loss, which the public have sustained; for no one can have observed his progress during the last two years of his life, without perceiving that he always rose with the occasion, and that the higher his position, the greater the responsibility resting upon him, the more difficult the task to be performed,—the greater was his display of ability. It is clear that his career closed before the powers of his mind were fully developed. His private friends will deplore the loss of one, to whom they were affectionately attached;[1] we shall recollect his laborious and successful career, his intellectual and moral

[1] Mr. Sharpe was the nephew of Mr. Rogers, the poet; a connection which must have afforded him opportunities of becoming acquainted with the best society, literary, fashionable, or political; but his leisure hours were ordinarily spent at the Athenæum club, amongst a small circle of distinguished friends.—*Edit.*

qualities, and grieve over the death of an eminent advocate, who exercised an influence for honourable and useful ends, and was capable of filling with great public advantage the highest posts of his profession.

C.

ART. III.—NOTICES OF EARLY ENGLISH LAWYERS.—NO. III.

PLOWDEN.

EDMUND PLOWDEN, descended from an ancient and respectable family long settled at Plowden, in the county of Salop, was the son of Humphrey Plowden of Plowden, by his wife Elizabeth, daughter of John Sturey, Esq. of Ross Hall, in the same county, and was born at Plowden in the year 1519.

According to his own account in the "Prologue" or Introduction to his Reports, he began the study of the law in the twentieth year of his age. Anthony Wood however assures us, that after having spent three years at the University of Cambridge, in the study of "arts, philosophy, and medicine," and after his admission at the Middle Temple, he came to Oxford, and there also passed four years in the same studies; and in November 1552, was admitted by a vote of convocation to practise surgery and physic; but changing his profession at the mature age of thirty-five, then betook himself to the law. These accounts are not absolutely irreconcilable, since it is possible that he might, after originally entering upon a course of legal reading, have dedicated an interval to other pursuits, and in the end returned to his original profession; although his own statement would undoubtedly import that he had uninterruptedly devoted himself to the law. At all events, when he did seriously apply himself to legal study, he pursued it with extraordinary ardour and diligence, insomuch that a tradition existed in Anthony Wood's time, that during three years he went not once out of the Temple—a statement which will hardly be accepted as literally true.

He soon acquired a high reputation for vast legal attainments; but his advancement did not wholly depend even upon talents and learning such as his. He had the early and active patronage of a wealthy baronet, Sir Francis Englefield,

Master of the Wards in the reign of Queen Mary, and was entrusted with the management of his estates in Shropshire. When, on the accession of Elizabeth, Sir Francis sought a voluntary exile on account of his religion, Plowden adhered faithfully to his interests, and having obtained the wardship of his heir, instead of disposing of his ward in marriage to his own daughter, or making sale of the trust, as was the common practice of the feudal guardians, he made a free gift of his authority to the ward himself. From a MS. narrative of the transaction, written by his nephew, Mr. Andrew Plowden, we extract the following details, which are not without interest as illustrating the state of society and manners in that age :—

"Mr. John Englefield, brother to Sir Francis, died [in 1567], Francis Englefield, his son and heir, being a child of the age of about five or six years, and fell in ward, by reason of a tenure in capite, to the queen. Mr. Plowden then being at London, having intelligence thereof in a morning very early, upon the news presently rose out of bed, and went to the court, he then being of counsel with William Earl of Pembroke, one of her majesty's privy council; which earl had oftentimes before prayed Mr. Plowden to espy out some suit to the queen worth five hundred pounds, and promised he would obtain it, seeing he was indebted to Mr. Plowden for so much. He came to the earl, told him of the death of Mr. John Englefield, and of the wardship of his son; put him in mind of his promise; prayed the earl to get the wardship for him, in lieu and recompense of his lordship's promise, and Mr. Plowden's service to his lordship. The earl being, although unlearned, an excellent wise man, and knowing the good will Mr. Plowden bore to the house of Englefield, answered, 'True, Mr. Plowden, my promise is so, but I meant it for your own good, and not for the good and commodity of any other. If I obtain this suit for you, you will not benefit yourself thereby, but you will bestow it upon the widow, or at Sir Francis's direction; and therefore I pray you,' said he, 'seek out some other thing; this will not be for your profit, and I am therefore loth to deal therein.' 'Sir,' said Mr. Plowden, 'I beseech you leave that to my discretion; I will accept it at your hands instead of any good turn, and as a gift to me

by your honour of five hundred pounds.' The earl, seeing Mr. Plowden thus earnest, being abed, rose, went to her majesty, and afterwards to the Master of the Wards, and fully obtained it for Mr. Plowden, and caused the same to be entered accordingly. Within half an hour after, and before Mr. Plowden departed the court, the Lord Hunsden came to have obtained it, but it was in vain, for it was gone before, as aforesaid."

The gift of the wardship to young Englefield is narrated by another member of the family:—" Mr. Englefield, Mr. Francis Fytten, (her brother), and young Englefield, were at Shiplake. After dinner Mr. Plowden went into his new parlour, called them unto him"—together with the narrator and other relatives;—" there being, turned his talk to young Mr. Englefield, and said thus in effect: ' Mr. Englefield, you are my ward, and now come to your full age; what say you and your friends to me for it? I did get your wardship of myself without the help of any of your friends; my old Lord Pembroke did it at my request;' and told in substance that which has been before rehearsed, and added further, that he was not in any case so beholden or bound to Sir Francis or any of his friends that should move him to bestow so great a benefit upon any of them; 'for,' said he, ' Mr. Englefield, your expectation is great, and according to that I may now have for your wardship and marriage, and my old Lord Montagu has offered for you two thousand pounds; and as for Sir Francis Englefield, he is far more bound and beholden to me than I to him, and there is no privy or secret matter, but I may make my best of you.'"

After this little proem to enhance his own gracious intentions, the worthy lawyer makes the heir a free gift of his wardship and marriage, stipulating only that he should grant a lease to his benefactor's nephew of a certain part of the estate, when it came to his possession, in requital of services done to Sir Francis abroad; a promise which, after Plowden's death, was ungratefully broken.

In the year 1557 Plowden was chosen autumn reader of the Middle Temple, and three years afterwards Lent reader; " being then," says Wood, " a serjeant at, and accounted the oracle of, the law." His name, however, is not to be

found in the list of serjeants given in Dugdale's Origines, which Wood, who states that he was called to the coif in the 5 & 6th of Philip & Mary, (1558), accounts for by telling us that he was omitted in the College of Serjeants in the ninth of Elizabeth, as being an unalterable papist. Plowden himself, in the title page to his Reports, which he first published in 1578, styles himself "Edmund Plowden, an apprentice of the common law;" and in the important case of Stradling v. Morgan, (Plowd. 201 a), decided in Easter term, 2d Eliz. (1560), he states it to have been argued on behalf of the defendant "by an apprentice of the Middle Temple," evidently meaning himself, as he gives the name of the opposite counsel, and a voluminous report of the arguments on both sides. And Leonard, who prefixes to his Reports, extending from the 18th to the 33d of Elizabeth, a list of the names of "the learned lawyers, serjeants at law, and judges, who argued the cases and were then judges of the several courts," names Plowden without any addition. In 1572 we find him treasurer of his Inn,—the year in which the building of their noble hall was commenced; a work of which, says Fuller, he was a great advancer. The handsome pile of buildings erected a few years ago on the western side of the Middle Temple Lane, and immediately adjoining the Hall, were appropriately designated by the venerable name of this distinguished member of their society.

The cases comprised in Plowden's Reports, which were published by him, as we have said, in the year 1578, extend from the 2nd Edw. 6, (1548), to the 6th Elizabeth, (1564), and have always possessed the very highest authority. The anthor tells us in the prologue, that when he first entered upon the study of the law, he resolved upon two things, which he determined earnestly to pursue; first, to be present at and give diligent attention to the debating of legal questions, and particularly to the arguments of those who were of fame and reputation for learning; secondly, to commit to writing what he heard, and the judgments thereon, "not trusting to a slippery memory, which often deceiveth its master... I first began this work," he proceeds, "for increase of mine own learning only, then meaning nothing less than to set it forth in print; until, after I had let some of the judges, and others of great

learning and gravity, upon their earnest motion, see the work, great request was made to me to publish it in print." Two considerations, however, deterred him:—first, that anciently there had been accredited reporters of law cases, chosen for the purpose, and receiving a yearly stipend from the crown, who conferred together on the framing of their reports, which therefore, by reason of the number and approved learning of the reporters, carried great credit and authority; whereas he alone, "a man of simple learning and small memory," had compiled these notes, and therefore thought it best to keep them secret in his own study: secondly, that he had for the most part given a summary report, containing the effect only of the arguments and judgments, justly thinking "few arguments so pure in which there was no refuse, and therefore best to utter the pure only, and omit the refuse," and so purposely omitting much that was said both at the bar and from the bench; a task requiring much judgment and memory, and which, if injudiciously executed, might do much injury to the counsel and judges, and minister just cause of offence. As usual, however, copies had multiplied in manuscript, many of them, he says, transcribed by clerks and other ignorant persons, to the great corruption of the text, and he was therefore "violently enforced" to publish the work with the authority of his own name.

It is a collection of selected cases, most of them of the highest importance, and relating to questions of great legal or constitutional interest. We may instance the Case of the Duchy of Lancaster, in which the question was as to the validity of a reversionary lease of duchy lands made by Edward VI. in his minority, and the history and privileges of the duchy were most learnedly and laboriously investigated; the Case of Mines, a learned inquiry into the nature and extent of the prerogative royal over mines of gold and silver within the realm; the case of Willion v. Berkley, as to the application of the statute *de donis* to the crown; with many others of equal importance and interest.

Of course it was impossible that such a series should be altogether free from errors, as well of the reporter as of the court. Bacon, in his report to James I. upon the apology made by Sir Edward Coke for his Reports when questioned

for them before the Privy Council, informs him that the Chief Justice had "said there were of his reports eleven books, that contained about five hundred cases; that heretofore in other reports, as namely, those of Mr. Plowden, which he reverenced much, there had been found nevertheless errors, which the wisdom of time had discovered, and later judgments controlled; and enumerated to us four cases in Plowden which were erroneous, and thereupon delivered to us the enclosed paper; wherein your Majesty may perceive," sneeringly observes his jealous and bitter detractor, "that my lord is a happy man, that there should be no more errors in his reports than in a few cases of Plowden."

Plowden adhered through life to the Roman Catholic religion, and dying in that faith, on the 6th of February, 1584, in his 67th year, was buried near the east end of the choir of the Temple Church, where a monument was placed to his memory, bearing a modest Latin inscription. Camden, under date of that year, thus notes his death, in his Annals of the Reign of Elizabeth:—"In England died this year Edmund Plowden, than whom no man is more worthy to be remembered; who, as he was singularly well learned in the common law of England, whereof he deserved well of his writings, so for integrity of life he was second to no man of his profession."

He left behind him a considerable patrimonial estate at Plowden, besides acquired property at Shiplake in Oxfordshire, and Burghfield in Berkshire. He married Katharine, daughter of William Sheldon, Esq., of Beeley in the county of Oxford, and had by her two sons, Edmund and Francis, who successively inherited his estates, and from the younger of whom sprung the present family of Plowden, of Plowden Hall and of Aston-le-Walls, Northamptonshire,—and three daughters. One of his descendants was the late Francis Plowden, a Chancery barrister of some eminence, and the author of a History of Ireland.

Dyer.

This learned and estimable judge was descended from a family of antiquity and consideration in Somersetshire, of which Sir Edmund Dyer, Chancellor of the Order of the Garter in the reign of Queen Elizabeth, was a member. He

was the younger son of Richard Dyer, Esq., of Wincalton and Round-Hill, in that county, and was born at the last named place, about the year 1512. Of the course of his early education we have no account; but we learn from Anthony Wood that he became a commoner of Broadgate Hall, now Pembroke College, in the University of Oxford, and that he removed thence without having proceeded to any degree, probably about the year 1530, having been entered of the Middle Temple. In 1552[1], we find him autumn reader of his Inn; and a few months before, (10th May, 1552,) he had been called to the degree of the coif. In the following November, he received the appointment of King's Serjeant.

He was a member also of the short-lived parliament which was called by Edward VI. in February, 1552—3, and dissolved within a month, and was chosen its Speaker, in which capacity, as the Journals inform us, "he made an ornate oration before the king," no doubt after the fashion of euphuistical servility which deformed that age. On the accession of Queen Mary, Dyer was reappointed (19th October, 1553) one of the Queen's serjeants, and in the following year he had the conduct on the part of the crown, in conjunction with the Attorney-General and his brother serjeant Staunford, of the singular trial of Sir Nicholas Throckmorton, so remarkable, as well for the talent and intrepidity of the prisoner, as for the rare courage of the jury who dared to acquit him. Not long after this period, Dyer appears to have filled the office of Recorder of the borough of Cambridge; but a higher advancement awaited him; on the 20th May 1557, he was appointed a puisne judge of the Common Pleas, receiving at the same time the honour of knighthood. From that place, on the 23d of April 1558, "on account," as he informs us, "of the absence of Morgan Justice, whose turn it was to keep the essoigns in B. R.," he was transferred to the Court of Queen's Bench, where he sat during the remainder of that reign. A curious doubt was started, "whether the force of his first letters patent, of justice of the Common Pleas, was gone and ceased by this new patent:" and he himself, with a majority of the other judges, thought that it was, "because the inferior

[1] There is a hiatus in the records of the Middle Temple from 1525 to 1551.

authority is taken away and resumed by the superior, as if a benefice became void by the promotion of the incumbent to a bishopric;" and also because it was improper that a man should reverse his own judgment, as he would do in this case by error in the Queen's Bench. For which reasons, and upon solemn precedents, they ventured to determine that a man who sat in one court had not at the same time a constructive seat and presence in another. In the first year of Queen Elizabeth's reign, however, (18th November, 1559) Sir James Dyer was replaced in his former seat in the Common Pleas, and in the following January elevated to the post of Chief Justice of the same court, in the room of Sir Anthony Browne, who was removed from his precedency on account of his adherence to Romanism, and was content to remain a puisne judge of the court over which he had before presided. Dyer, notwithstanding his elevation to the bench by Queen Mary, had all along professed the reformed religion.

For twenty years following he discharged the duties of this high office with diligence, ability, and integrity. In 1571, he assisted at the trial of the Duke of Norfolk for his treasonable design of marriage with Mary Queen of Scots. He delivered his opinion against the claim of the Duke to have counsel assigned to him—which the prisoner had founded upon the supposed precedent of Humphrey Stafford's case, in the 1st of Henry VII.,—and no doubt rightly, according to the rigorous law then in force. A few years afterwards (1574) he gave a signal example of his probity and spirit, in the determination with which he interposed the protection of the law between the oppression of a wealthy Warwickshire knight, Sir John Conway, and a poor widow, whom he had first harassed with litigation, and failing in that, had taken possession of her farm with the strong hand. At the assizes for that county, the Chief Justice sharply rebuked in public certain of the justices of the peace for partiality and negligence in having permitted so gross a violation of the law, and caused indictments to be preferred, not only against those who had taken part in the riotous proceeding, but also against the justices for neglect of their duty in not repressing it. In return, they presented "Articles of Supplication" to the Privy Council, complaining of his conduct in this matter, and representing

also, that "because at the assizes there happened to be a gun shot off, without the will or knowledge of the justices, or intention to commit any offence, the Lord Chief Justice had charged them with a general slackness of their duty, and said they ruled the country as pleased them, and that there was nothing with them but *sic volo, sic jubeo.*" In his answer to this complaint, which is extant in MS. in the Inner Temple Library, the honest and fearless judge admits and justifies the accusation: confesses that he *had* declared openly to some of the Lords of the Council, "that he never saw a justice indifferent to deal in the matter touching Sir John Conway;" and that he had so said, "because all the justices there, at the Lent Assizes, came to him together, praying him in the behalf of Sir John Conway, that the matter might be committed to the order of some gentlemen of the county; which he then thought to be a request not indifferent, considering the poor widow could never find any assistance of them in her suit and trial, nor to speak in her cause, but rather against her, saying all that she was a naughty woman, and had two husbands alive; which," as he truly adds, "was nothing to the matter."

One of the points alleged against him was, that he had framed the indictments with his own hands; to which he answers,—"I do confess the framing of my bills myself, the party for poverty not able to have counsel to do it, and the Queen, whom this matter did touch, having no counsel for her there to do it: which thing I was bound to do, and so is every other justice, for the advancement of her service, or else justice should fail oftentimes in such cases, the offender being such and so well allied there as Sir John Conway is." This would, however, be considered a curious addition to the duties of a judge of assize in our days. "All which premises being true," his lordship concludes, "I ask judgment of the said lords, and all others indifferent, whether I had just cause ministered unto me, by the defaults and government of the shire, and slackness of her Majesty's service, to be angry, and vehemently moved to choler. And although I did say *in excessu meo, 'Omnis homo mendax'* (as David said); yet for mine age and long continuance there, which hath been above twenty years in that circuit, I am rather to be borne with than complained of (as I think in mine own judgment)

first in all haste to the Queen's Majesty by word of mouth, and next to the Lords of the Council by bill of supplication."

It was not likely that honesty and firmness such as this should displease the kindred spirit of Elizabeth. Accordingly, it does not appear that the stouthearted old judge experienced any diminution of the royal favour: he continued in the exercise of his judicial functions down to the period of his death, which occurred at his seat of Great Stoughton, in Huntingdonshire, on the 24th of March, 1782, in the 70th year of his age. He was buried at Stoughton, where a handsome monument was erected by his heir to his memory, inscribed with the following magniloquent hendecasyllables:—

"Deyero tumulum quid statuis, Nepos?
Qui vivit volitatque ora per omnium.
Exegit monumenta ipse perennia,
In queis spirat adhuc; spirat in his themis,
Libertas, Pietas, Munificentia.
En decreta, libros, vitam, obitum senis!
Æternas statuas! Vivit in his themis,
Libertas, Pietas, Munificentia.
Æternas statuas has statuit sibi;
Æternis statuis cedite marmora!"

By his wife Margaret, daughter of Sir Maurice à Barrow, a Hampshire knight, and widow of the philologist Sir Thomas Elyot, Sir James Dyer left no issue, and his estates at Stoughton, together with his mansion-house in the Charterhouse yard, descended to his great nephew, Sir Richard Dyer. The representative of his family in the reign of Charles I. was raised, in 1627, to the baronetage; the title, however, became extinct in 1670, and the last lineal descendant of the judge is said to have died in a state of extreme penury.

He made an express bequest to his nephew, Richard Farwell, of "all his books of the law, as well abridgments and reports of his own handwriting, as other of the law." Besides his Reports, he was the compiler of a Reading on the Statutes of Wills, probably drawn up by him when he filled the office of reader of his Inn. The Reports were published by his legatee shortly after his death, preceded by a eulogistic Latin preface, and by several copies of still more panegyrical Latin verses. They were again edited, in 1688, by Lord Chief

Justice Treby, who added ample marginal references to other authorities. A few of the earliest cases range from the 4th to the 19th of Henry VIII. It is obvious that these are borrowed from some other source. In one of the copies of verses prefixed, his own notes are spoken of as "ter denos vix congesta per annos;" which, taken literally, would seem to imply that his labours as a reporter commenced only about the 6 Edw. VI. (1552). Perhaps, however, they may reasonably be supposed to date from about the 28th of Henry VIII. (1537), from which period the cases proceed in a regular series, and which would probably be two or three years after his call to the bar. In most instances the cases are without the names of counsel, and in some undistinguished by the names of the parties: they are however esteemed of high authority.

Lord Coke appears to have possessed himself of the original MS.; in the Preface to the 10th Part of his own Reports, he describes the work as "the Lord Dyer's book, containing the fruitful and summary collections of that reverend father of the law, Sir James Dyer, knight, late Chief Justice of the Court of Common Pleas, for his private use and remembrance, and never intended by him in this form to be made public, but were left them imprinted after his decease, in anno 25 Reg. Eliz., the very original whereof, written with his own hand, I have."

Sir Harbottle Grimston (Preface to Cro. Car.), speaking of the falling off in the number and authority of reporters after the termination of the Year Books, says—"If we have since failed in the number of the persons reporting, it hath been amply recompensed in the grandeur and authority of one single author, Sir James Dyer, Chief Justice of the Common Pleas, by whose great learning and assiduity the said judgments and law resolutions have been transmitted and perpetuated until the 24th year of the reign of Queen Elizabeth."

The character of Lord Chief Justice Dyer, both in his private and his judicial capacity, is highly eulogised by his contemporaries. We may sum up their panegyrics in the words of Camden, who commemorates him as a man "qui animo semper placido et sereno omnes judicis æquissimi partes implevit, et juris nostri prudentiam commentariis illustravit."

Croke.

The family of Croke is of the highest antiquity, and boasts a pedigree which is traced back even to royalty. Two noble brothers, Robert and William le Blount, descended immediately from the illustrious family of the Counts de Guisnes, in Picardy, and deriving their undoubted lineage, more remotely, from the blood royal of Denmark, held high rank in the army of William the Conqueror, and received from him, after the Conquest, grants of extensive fiefs in this country. From the elder of them descended the two families of Le Blount, Barons of Ixworth in Suffolk, and Lords of Belton in Rutlandshire. Sir Thomas Blount, with his cousin Nicholas le Blount, both members of the latter family, were deeply implicated in the conspiracy formed in 1400 to restore Richard II. to the throne. The former was taken prisoner after the battle of Cirencester, and executed, with all the barbarity of that age, at Oxford. The latter escaped to the continent, and after passing some years in the military service of the celebrated Duke of Milan, Galeazzo Visconti, returned to England in 1404, but for his greater security laid aside his own name, and assumed the less aristocratic and euphonious one of Croke. From him descended, in a direct line, John Croke, alias Le Blount, whom we find, in the year 1522, filling the office of one of the six clerks in the Court of Chancery.

In the times when the Chancellor was usually an ecclesiastic, the officers of the Court were also generally of the clerical order, and were therefore restricted from marrying, until, in this year 1522, upon the petition of Croke and his brethren, Parliament passed the statute 14 & 15 Hen. VIII. c. 8, removing this restraint. Mr. Croke was not long in availing himself of the liberty thus granted, and took to wife Prudentia, one of the daughters of a gentleman named Cave, and sister of Sir Ambrose Cave, chancellor of the duchy of Lancaster and a member of Queen Elizabeth's Privy Council, and an intimate friend of Lord Burleigh. By the aid probably of this alliance, Mr. Croke became successively comptroller of the Hanaper in Chancery, clerk of the inrolments, and finally, in the year 1549, a master in Chancery, an office at that period of very

high consideration. He had long before enriched himself by his official gains, and in 1529 had purchased of the Lord Zouch the estate and manor of Chilton, with other lands in the county of Bucks, and erected there the mansion-house of Chilton, which became the principal seat of the family. He died in 1554, leaving a son John, who attained knightly rank, served in parliament, first for the borough of Southampton, and afterwards for the county of Buckingham, and marrying Elizabeth, daughter and coheir of Sir Alexander Unton, a gentleman of a distinguished Buckinghamshire family, had by her five sons, of whom no fewer than four chose the law for their profession; and the third of whom, George, is the immediate subject of our notice.

The eldest of these brothers, John Croke, also attained judicial rank. Born in 1553, he was admitted of the Inner Temple in 1570, and, steadily advancing in his profession, was chosen in 1598 to the office of recorder of London; sat in the parliament of 1585 for the borough of Windsor, and in those called in 1597 and 1601 for the city of London; in the latter year became speaker of the House of Commons; in 1603 was called serjeant, and honoured with knighthood; in 1607 was made one of the king's serjeants, and a Welch judge; and in the following year was appointed a judge of the King's Bench, which office he filled, with a fair reputation for learning and integrity, until his death in 1619.

The third brother, George Croke, was born at Chilton about the year 1560. "He passed his infancy and tender years," as we are told by his son-in-law, Sir Harbottle Grimston, "under the wings and care of a most discreet and tender mother, in the exercise of all good qualities, giving thereby very early signs of his future perfection in learning." He received his early education at the grammar-school of Thame, formerly of no small celebrity, and of which, amongst other eminent men, the Lord Chief Justice Holt was afterwards a pupil. In 1575 he was entered of Christ Church, Oxford, having been already, in the preceding year, admitted a member of the Inner Temple. He applied himself steadily to his legal studies, and gradually advanced in knowledge and repute. In 1597 he came into parliament as member for Berealston,

and in the same year was elected a bencher of his inn; of which, in 1599, he was also appointed "autumn reader," in 1609 treasurer, and in 1617 "double reader." On the 29th June, 1623, he received his writ calling him serjeant, and at the same time was knighted, and appointed a king's serjeant. Long before this time he had acquired a large practice, and his name occurs continually in the contemporary reports. As early as the year 1615 he had purchased, from a relation of his mother's, the manor and estate of Waterstoke, near Thame, in Oxfordshire; and in 1621 he bought also from his nephew, Sir John Croke, whose dissolute habits had wasted his patrimonial property, the estate of Studley Priory, in Buckinghamshire. He formed too an advantageous matrimonial alliance, having married Mary, one of the daughters of Sir Thomas Bennet, Lord Mayor of London, in 1602, and brother of Richard Bennet, ancestor of the Earls of Arlington and Tankerville.

On the death of Sir Humphrey Winch, one of the judges of the Common Pleas, in February 1624, Sir George Croke was raised to the bench in his room. The lord keeper Williams writes upon his promotion to the Duke of Buckingham—the universal dispenser of honours and offices—with a warm congratulation on the honour he had gained in making the appointment. "I never observed," he says, "in all my small experience, any accident in this kind so generally and universally accompanied with the acclamations of all kinds of people. I am importuned," he adds, "by the rest of the judges of the Common Pleas to return their most humble and hearty thanks to the king's majesty for his choice, and to assure his majesty, that though his majesty hath been extraordinarily fortunate, above all his predecessors, in the continual election of most worthy judges, yet hath his majesty never placed upon the bench a man of more integrity and sufficiency than this gentleman; for which act they do with tears in their eyes praise and bless him." Sir George sat in that Court four years, until, on the death of Sir John Doderidge, one of the justices of the King's Bench, in Oct. 1628, he was transferred to the latter Court; the number of the judges of the Common Pleas being then permanently reduced from five to four. A question arose on this occasion as to his right of precedence. Before his

removal, he had three juniors on the bench; and his new patent had no clause saving his precedency, as had been the case on some similar occasions. The judges, however, all came to the determination that such a saving was not required; that on his translation he retained the same rank, and that the patent of revocation of his place in the Common Pleas had been unnecessarily issued.

Sir George Croke's judicial learning was great, and—rare virtue in those times—his judicial integrity unimpeachable. He lent no willing aid to the attempts of Charles I. to make the courts of law the instruments of his arbitrary designs. On every application for a habeas corpus, or for the discharge of a person from custody, where the party was legally entitled to it, he unreservedly gave his opinion to grant it. Thus, in the case of Atkinson, who was committed to prison by the lord chamberlain in 1629, for suing one of the king's servants without his leave, and who, after having been once released by habeas corpus, was again committed by the lord chamberlain's warrant, Croke concurred with Jones and Whitelocke, against the opinion of Chief Justice Hyde, in granting a second habeas corpus.

So, in the well-known case of Selden and other members of the House of Commons, when the prisoners were discharged on giving bail and finding securities for their good behaviour, Croke refused to concur to this extent with his brethren, and insisted that the prisoners were entitled to be bailed absolutely and without condition.

Finally, on the great question as to the legality of the exaction of shipmoney, although he had, with the rest of the judges—but for conformity only, and in compliance with the resolution of the majority, as he avers—subscribed their answer to the king's inquiry, affirming the legality of the writ, when the judgment came to be pronounced, he delivered an elaborate and conclusive argument against the crown. Whitelocke indeed tells us, that he had so nearly compromised his conscience as to have resolved to give judgment for the king, and had prepared a judgment accordingly, but that, after conference with some of his relatives, and more especially on the earnest persuasion of his noble-minded wife, who implored him not to sacrifice his conscience for fear of any prejudice to his family, for that she

was content to suffer any misery with him, rather than to be an occasion for him to violate his integrity—he abandoned this intention, and, together with Justice Hutton, gave an unqualified judgment in favour of the defendant. Being pressed by the argument of the solicitor-general Littleton, on behalf of the crown, that the case had in effect been resolved by the opinions of the judges under their hands, he admitted that he had set his hand to two opinions, the first of which, being more general in its terms, he still maintained; but with respect to the other, he confessed that he subscribed it, but alleged that he had at the time stated his dissent from the opinions of the majority, but had done it upon the affirmation of others of the judges that they had seen records and precedents of such writs, satisfying them of its legality; that it was usual in such cases to submit to the majority notwithstanding a difference of opinion, and that, although he subscribed, it was upon the understanding that he should not be bound thereby, if the case came judicially before them.

This, however, was but the self-excusing of a self-accusing mind: the judgment was in truth, as Mr. Hallam observes, "the ultimate success that sometimes attends a struggle between conscience and self-interest or timidity." Accordingly, the judge proceeded to avow boldly, "And if I had been of that opinion absolutely, now having heard all the arguments of both sides, and the reasons of the king's counsel to maintain this writ, and the arguments of the defendant's counsel against it, and having duly considered the records and arguments cited and showed to me, especially those of the king's side, I am now of an absolute opinion that this writ is illegal, and declare my opinion to be contrary to that which was subscribed by us all. And if I had been of that opinion, yet upon better advisement, being absolutely settled in my judgment and conscience in a contrary opinion, I think it no shame to declare that I do retract that opinion, for *humanum est errare*, rather than to argue against my own conscience." He then proceeded to demonstrate the successive propositions, that the command to furnish ships at the charge of the subject, without authority of parliament, was illegal at common law—that it was expressly contrary to statutes—that it could not be maintained by any assertion of prerogative, or allegation of neces-

sity or danger—that even admitting it to be legal to lay such a charge on maritime ports, its charge on an inland county was illegal and unwarranted by precedent—that the precedents and records cited did not support it—and lastly, that the particular writ was in several respects irregular. "The countryman's wit," says old Fuller, "will not soon be forgotten, that shipmoney may be gotten by *hook*, but not by *Crook*."[1]

In the year 1640, an attack was made upon Sir George Croke in his judicial capacity, by one Cusacke, a person of good family in Ireland, and a solicitor in the Star Chamber, who procured process to be sued out in that Court, and a bill to be preferred thereon, at the suit of two persons without their authority, charging the judge with having given an unjust judgment against them in the Court of Chancery. For this an information was filed against Cusacke in the Star Chamber, and he was adjudged to be committed to the Fleet until he gave security never to meddle again with the solicitation of causes, to pay a fine of 500*l.*, and to be set in the pillory, and carried through Westminster Hall with a paper on his head declaring his offence, and in every Court to acknowledge his offence, and ask Sir George Croke forgiveness. A tolerably sharp requital of such an offence, especially when it is considered that the bill abated only on the technical ground that it described the judge simply as Sir George Croke, Knight, without the addition of his office and dignity of judge.

In the following year, 1641, having occupied his seat for sixteen years, and "by his exceeding care and pains," says his son-in-law, "worn out his weak and aged body," he petitioned the king for permission to resign his office, and retire into the country. His request was granted in the most gracious terms, and his attendance at Westminster and on the circuits thenceforth dispensed with, he being continued a judge of the King's Bench, and receiving the same fees and allowances as the rest of the judges, (except the allowance for the circuits), until, as Sir Harbottle Grimston phrases it, with true professional pedantry, "a certiorari came from the great judge of heaven and earth, to remove him from a human bench of law to a heavenly throne of glory." He retired upon his resignation to his house at Waterstoke, and there lived, in the practice of extensive charity and benevolence, for a few months longer,

[1] The name was frequently so spelt.

when he died in his eighty-second year, and was buried in the chancel of Waterstoke church, where his widow raised a mural monument to his memory, bearing his effigy, with this happily expressed inscription:

" Georgius Croke, eques auratus,
Unus justiciariorum de Banco Regis,
Judicio lineato et animo præsenti insignis,
Veritatis hæres,
Quem nec minæ nec honos allexit:
Regis auctoritatem et populi libertatem æquo lance libravit;
Religione cordatus, vitâ innocuus,
Manu expansâ, corde humili, pauperes irrogavit.
Mundum et vicit et deseruit,
Anno ætatis suæ LXXXII., annoque Regis Caroli XVII.,
Annoque Domini M.DCLXI."

A copy of elegiac verses, addressed by a contemporary to his memory, is printed from the MS. by Sir Alexander Croke, in his genealogical history of the family, which fills two goodly quartos. The following lines have much of the vigorous expression of Dryden:

" Who saw him on the bench, would think the name
Of friendship or affection never came
Within his thoughts; who saw him thence, might know
He never had, nor could deserve, a foe.
Only assuming rigour with his gown,
And with his purple laid his rigour down.
Him no respect nor disrespect could move,
He knew no anger, and his place no love.
So mixed the strain of all his actions ran,
So much a judge, so much a gentleman.
Who durst be just, when justice was a crime,
Yet durst no more, in so unjust a time."

Besides his private benefactions, Sir George Croke founded and endowed a chapel within the parish of Beckley, near his house of Studley, many of the parishioners having to go a distance of upwards of two miles to the mother church; he built also a hospital for the poor of the same parish, which he endowed with a liberal revenue, and framed a code of rules for its management. In 1629, he gave a donation of 100*l.* to Sion College, to be expended in the purchase of books for its library.

To his profession he bequeathed a valuable legacy in his

three volumes of Reports, which were published after his death by his son-in-law, Sir Harbottle Grimston, Master of the Rolls after the Restoration. They extend from the 23d of Elizabeth (1581), to the 16th of Charles I. (1641), each volume comprehending one of the three reigns. The reports *tempore* Elizabeth were published last, namely, in the year 1661, and preceded by a fulsome and hypocritical dedication to the newly restored monarch, wherein the editor laments that his original purpose to dedicate to him the whole series, "as the grand Mecænas of the common law, had been, to his unspeakable grief, unhappily prevented by the extreme difficulty of public address to his majesty's sacred person, divided from his good subjects by the cruel, wicked, bloody, and desperate practices of horrid intruders and usurpers; so that, enforced to yield to the necessity of the times, he had sent forth the two former series with a preface only, to encourage gentlemen in the study of the law, which he conceived was the best way not only to evidence his majesty's most just, undoubted, and hereditary right to his three imperial crowns, but likewise to restore him to his prerogative royal, and give him that supremacy which was due to his sovereign authority!" On the value and authority of these reports it is needless to enlarge: they are the subject of daily citation in Westminster Hall.

Sir George Croke had by his marriage several daughters, none of whom left issue, except Mary, the wife of Sir Harbottle Grimston, whose eldest daughter was the ancestress of the present Earl of Verulam. His brothers were the sources of numerous descendants. The late Sir Alexander Croke, long known and respected as a bencher of the Inner Temple, and, as we have already mentioned, the historian of the family, was lineally descended from the fifth brother, Paul Ambrose, also a member of the bar.

We will not quote the laboured panegyric of Sir Harbottle Grimston upon his venerable relative, but conclude with the brief eulogy of honest Anthony Wood:—"He had in him a most prompt invention and apprehension, accompanied with an excellent memory; by means whereof, and his sedulous and indefatigable industry, he attained to a profound science and judgment in the laws of the land. He was resolved and steadfast for the truth, of great integrity, very liberal, and especially charitable."

ART. IV.—*A Treatise on the Law respecting Parties to Actions.* By Frederic Walford, Esq. of Lincoln's Inn, Special Pleader. In Two Volumes. London. 1842.

THE law respecting parties to actions is one of the greatest practical importance in a system of jurisprudence like ours, yet the only English lawyer who (prior to the appearance of the publication before us) had deemed it worthy of a book, was the late Mr. Hammond, who, though he conveyed as usual much solid information and displayed great ingenuity of remark, passed much too cursorily over several of the branches, and was moreover wanting in clearness both of arrangement and of style. We are therefore glad to find it undertaken by Mr. Walford, who appears to have spared no pains to make his treatise both accurate and full.

It is not our intention to write either a formal review of the book or a systematic dissertation on the subject. We merely propose at present to notice a few of the more important topics in detail, which will have the twofold advantage of putting our readers in possession of the present state of legal opinion regarding them, and illustrating in the most effectual manner the merits of the treatise.

Having in the first book traced the rights and liabilities in actions springing out of contracts, viewed simply as such, the author comes in the second to apply the principles thus elicited to the different descriptions of contracts: first, to contracts for the carriage of goods by land. A question that here presents itself for consideration is, who is the proper party to sue for a breach of the carrier's engagement; a question which conflicting decisions have somewhat contributed to involve in obscurity:

"When goods, which have been entrusted to a carrier for the purpose of conveyance, are lost by the carrier's default, the rule, as generally laid down is, that the action for the non-delivery of them must be brought by the party in whom the property in the goods is vested. Thus it is laid down by Lord Kenyon, in giving judgment in Dawes v. Peck,[1] that the question as to who is the proper party to sue in such a case, must be entirely governed by the question in whom the legal right is vested; for he is the person

[1] 8 T. R. 332.

who sustains the loss, and if so, he is the proper party to call for compensation from him, by whom he has been injured. This rule, however, does not appear to be quite accurate. Undoubtedly, the person in whom the property is vested is in general the proper party to bring the action; but then he is so, not because the property is vested in him, but because from that circumstance the law presumes that he is the party who really contracts with the carrier, and that any other person employing the carrier acts only as his agent.[1] Accordingly, we find that where any thing exists to contradict this presumption, the owner ceases to be the proper party to bring the action; as in the cases of Davis v. James,[2] and Moore v. Wilson,[3] where a special agreement between the parties, that the consignor should pay for the carriage of the goods, was shewn to exist. The rule, accordingly, may perhaps be stated more properly in the words of Parke, J., in Freeman v. Birch,[4] that the person employing the carrier must bring the action, but that the circumstance of the legal right being in one person may be evidence of employment by that person. Hence it follows, that in order to decide who is the proper party to be made plaintiff in an action of this nature, the first inquiry must be, whether any special agreement for the carriage of the goods in question exists between the parties? if there is none, it then becomes necessary to ascertain in whom the right of property is vested. In the former case, the remedy for any breach of contract belongs to the party with whom such agreement is made. Therefore, where the consignor agrees with the carrier for the conveyance of the goods, and is to pay him, the action is well brought in his name.[5]

"In the latter case, we must look to the state and condition of the property under conveyance, and the relation in which the consignor and consignee mutually stand to it. Now these relations may be reduced to three general heads; the 1st, where the entire property in the goods remains vested in the consignor; the 2d, where it is in the consignee; the 3rd, where both alike are interested in the goods, the one as general, the other as special owner. In the first case, the law presumes the consignor to be the party who contracts with the carrier, and therefore vests in him all rights of action arising out of such contract. Suppose, for instance, goods are in the course of transmission from a principal to his agent or servant, for any damage or loss occurring to such goods in the course of

[1] Freeman v. Birch, 1 Nev. & Man. 420.
[2] 5 Burr. 2680.
[3] 1 T. R. 659.
[4] 1 Nev. & Man. 420.
[5] Davis v. James, 5 Burr. 2680; Moore v. Wilson, 1 T. R. 659; Freeman v. Birch, 1 Nev. & Man. 420.

their passage, the principal, it should seem, is the proper party to sue.[1] So likewise, where goods are sent by a carrier merely for approval, the property not passing to the consignee until he receives and adopts the goods, the consignor is entitled to bring his action against the carrier for any breach of his implied undertaking to deliver the goods.[2]

The rights incident to the carriage of goods by sea in a general ship form the next subject of consideration, and are, we think, satisfactorily explained and elucidated on similar principles.

Having treated of rights and liabilities ex contractu, relatively to the subject-matter of such contracts, the author proceeds to consider rights and liabilities ex delictô in the same point of view. To commence with the former of these heads, which form the subject of the third chapter of the second book:

"The party in general to sue for an injury to this description of property, is he who has the interest therein. For determining who this is in any particular instance, we must, it is obvious, endeavour to discover the various modifications of which personalty is susceptible, and in whom the interest is vested under every such modification. With this view it is proposed to consider the different relations in which a man may stand to such property, so as to be capable of suing in respect of it; viewing those relations, first, purely as such, and abstracted from circumstances; and second, as they actually exist under various combinations, the result either of divine or human agency, or of the combined influence of both. First, the position in which a man may stand to personal property is determined by two things; the quantity or duration of his interest, and the time at which it is to be enjoyed. Viewed in the first of these lights, property is divisible into absolute, special, and bare possession. In regard of the time of its enjoyment, it may be either in possession or expectancy. Hence arise six possible relations in which a man may stand to property; either he may have an absolute property clothed with possession, or the same without possession; or a special property with or without possession, or a bare possession, or, lastly, a mere reversionary right."

After treating of the various simple relations, viewed as such, and rights of action incidental to the same, he next

[1] Wright v. Snell, 5 B. & Ald. 350; Sargent v. Morris, 3 B. & Ald. 277.
[2] Swain v. Shepherd, M. & Rob. 224.

proceeds to examine these relations under the different combinations under which they are found practically to exist. In pursuance of this method, he is led to consider the subject of sales. He here traces out the different possible modifications of property incident to the contract, and the conditions which severally give birth to such modifications. The first stage, he considers, is where the right of property alone passes to the vendee, and the right of possession remains vested in the vendor; the second, where the rights both of property and possession pass to the vendee, and all that remains to the vendor is the bare possession; the third, where there is a reverter of the right of possession to the vendor before actual possession is acquired by the vendee; the fourth, where the twofold right of property and possession becomes clothed with the possession. As this may take place either by an actual or constructive delivery, the author is here led to consider the doctrine of stoppage in transitu, and endeavours to explain its operation by analogy to the case of an unpaid vendor, whose vendee becomes insolvent before the transition is begun.

"A distinction must be taken between a delivery in general, and one particular mode of delivery; viz. that to a carrier or middleman of any description, either expressly or by implication named by the vendee, and who is to carry on his account. In such a case, if the price is unpaid, and the buyer becomes insolvent, the seller has a right, in virtue of his original ownership, to retake the goods before they are actually delivered to the vendee, either at his own warehouse, or at a place which he uses as his own for the deposit of goods, or where he means the goods to remain, until a fresh destination is communicated to them by orders from himself. Whether this act of retaking possession is to be considered as rescinding the contract of sale, or merely restoring to the vendor the right of possession, can scarcely, perhaps, be deemed finally determined.[1] It should seem, however, that a more powerful effect can hardly be attributed to this act, than that of replacing the vendor in the same situation as if he had never parted with the possession.[2] Now, an unpaid vendor, before the transition is begun, upon the insolvency of the vendee, regains not the absolute right of property, but the right of possession.[3] The buyer, or those who stand in his place, may still obtain the right of possession, if

[1] James v. Griffin, 2 M. & W. 632; Clay v. Harrison, 10 B. & C. 99.

[2] James v. Griffin, 2 M. & W. 632.

[3] Bloxam v. Saunders, 4 B. & C. 949, judgment of Bailey, J.

they will pay or tender the price; or they may still act upon their right of property if any thing unwarrantable is done to that right. Hence, analogy would lead us to conclude, that a vendor, by stopping in transitu the goods of his vendee, must be considered to revest in himself, not the absolute dominion over the property, but merely a possessory right, in respect of which he will undoubtedly be entitled to sue in case of an injury done to the property, though at the same time, the reversion still remaining in the vendee, the latter may likewise claim a concurrent right of action for any loss actually sustained in respect of his reversionary interest. If after the seizure of the goods into the hands of the vendor, the vendee prove unable or unwilling to accomplish his bargain, by payment of the stipulated price, the vendor may go to him and request him to do so; and then, if he do not come and pay for and take away the goods in a convenient time, the vendor is at liberty to treat such further delay as tantamount to consent on his part to rescind the sale; and the property thereupon becomes revested in himself.[1]

As incident to the contract of sale, the author considers next the rights arising out of warranties, and shows that the doctrine of a warranty binding the goods, so as to run with them into the hands of a subsequent purchaser, is not in general recognised by the English law; though, where goods are avowedly bought for the use of some third party as well as the immediate purchaser, and a false representation touching them is made to the latter, which directly or indirectly is communicated to the party intended to share in the use of the article purchased, and upon which such party acts, and in consequence sustains an injury, an action, he considers, will lie, the injury not being in this case a mere remote consequence of the fraud, but one which the vendor must be supposed to have contemplated.

The author next considers bailments, and traces their different varieties, with the several modifications of property incident to these varieties. In the course of his inquiry into this head, he discusses very fully the distinction between a general contract of hiring, and a mere contract for the use of a chattel whereby only the enjoyment and service of the thing is parted with to the bailee.

"Instances of the latter kind occur principally in the case of carriages and vessels, and seem to have their origin in the peculiar

[1] Langford v. Tyler, Salk. 113, recognized by Lord Ellenborough, C. J., in Hinde v. Whitehouse, 7 East, 571; Smith's Merc. Law, 398, 399, 2d. edit.

nature of those chattels, which, as experience has shown, may often be made more fully to effectuate the respective purposes of the contracting parties under the last mentioned class of contracts than under the former. As to what is to be adopted as the respective criterion of each separate class, it is obvious that, supposing any specific agreement to exist, we must look to that to decide the real intention of the parties; or if there be none, we must then have recourse for an explanation of the intention of the parties, to the general circumstances of the thing engaged, the purpose and object it is designed to answer, and the like. Thus, take the case of a ship chartered for a voyage, and suppose, while it is thus engaged, an injury befall such ship by the tortious act of a third party, giving an undoubted right of action, and the sole difficulty being, whether, the general owner or the charterer is the party to enforce such right. We must here proceed to consider the terms of the charter-party or other agreement under which the ship is hired, taking them altogether, and viewing them in connection with its purpose and object, and see whether, upon such connection the general import is, that the merchant charterer is to have the possession of the ship, or the instrument amounts to a mere covenant to convey, modified by a detail of stipulations for managing the ship, so as not to disturb the actual ownership."

"In the absence of any express agreement, the real point of inquiry in all cases of this kind seems to be, under whose control, either actually or constructively, is the vessel or carriage at the time of the supposed injury."

The property in title deeds, abstracts, &c., and the rights of action incidental to that property, are likewise fully explained in the same chapter; as are also the division of rights consequent on the property in the soil becoming severed from that in certain of its profits, and the different effects of demises, accordingly as the interest of the lessee varies from a fundamental interest in the freehold, down to a bare possessory right of enjoyment of the surface.

In the next chapter we find the author discussing, and we think on clear and satisfactory grounds, the liabilities of the different parties concerned in the issuing or execution of legal process; whom he for this purpose distinguishes into three classes,—1st, the parties setting the court in motion, as the client or his attorney; 2ndly, the court, judge, or magistrate, under whose sanction the process issues; 3dly, the ministerial officer who is charged with the execution of it. A question here engages his attention which has been the sub-

ject of various conflicting decisions, namely, what is the line of separation between an excess of jurisdiction on the part of an inferior judge, and a mere error of practice in the course of the legitimate exercise of the court's authority. Upon this topic, after stating the different modes in which inferior courts may be guilty of an excess of jurisdiction, he comes to treat of an excess of jurisdiction in respect of the mode of procedure; and after a succinct analysis of the different authorities bearing upon the question, gives the following statement of the result:—

"From this purview of the cases, the following rules seem to be deducible: first, that where judges, tied down to one particular kind of process, award a different, (as, for instance, a verbal instead of a written precept,) they are stepping out of the line of their jurisdiction, and liable to an action; secondly, that certain forms, being by custom necessary to give an inferior court the jurisdiction of a cause, and therefore constituting a condition precedent to its granting process, the non-observance of such forms renders the proceedings void, and the judge a trespasser; but thirdly, that, where once a step has been taken in the cause, lying strictly within the jurisdiction of the judge, and therefore sufficient to ground his cognizance of it, an error in the subsequent proceedings, or even the total omission of a form collateral to the jurisdiction, does not amount to an excess of jurisdiction, such as to deprive him of the protection of his judicial character. This view of the case, of course, supposes the cases of *Bouchier* v. *Smith* and *Rycraft* v. *Calcraft* to be reconcileable, and that upon the grounds taken by the counsel for the plaintiff in the former of the two cases, viz., that the deficient affidavit was, in the former case, a necessary preliminary to the court's power of arrest; while, in the latter, it was a matter collateral to the jurisdiction of the court, and founded on a directory act of parliament, which did not declare the process void for the want of it,—a distinction which certainly seems not destitute of a reasonable foundation."

This same chapter likewise contains an elaborate examination of the liabilities incident to bailments, and in particular of those respectively attaching on the hirer and general owners of ships, carriages, vessels, &c., both in the case where the bailee enters into some engagement with a third party to employ the lent chattel in his service; and also where, during the continuance of the bailment, the chattel, in the course of its employment, occasions a damage to

a third person by the mismanagement of the party who has the actual control over it.

In the third book the author treats of rights and liabilities in action, relatively to the persons between whom they arise.

In the fourth, he considers the respective rights and liabilities of the trustee and cestui que trust. In the course of this inquiry he notices the much disputed question, who is the proper party to enforce a simple contract which is intended to operate for the benefit of another than the party actually furnishing the consideration. After a careful review of the conflicting authorities, he arrives at the following conclusion.

"The result of this survey of the authorities seems to be, that in general an action grounded on a simple contract must be brought by the party from whom the consideration moves, even though the contract be intended to operate exclusively for the benefit of another party; but that this rule may perhaps admit of one exception in the particular case of a near relationship existing between the party advancing the consideration and the party intended to be benefited, such as that of parent and child, or uncle and nephew; in which case the law has regard to the affection which, in the ordinary course of nature, prompts the one to provide for the other, and so identifies their interests, that it treats a promise to the one for the benefit of the other as a promise made to the other, and a consideration moving from the one as virtually moving from the other."

The fifth and last book embraces an inquiry into the doctrine of covenants running with the land, and also into the effect of a change of credit, more particularly in the case of the retirement of an old partner from or the introduction of a new partner into a firm. On a much debated question, how far an executor *de son tort* is bound by his own acts in case of his taking out administration, the author, after an analysis of the cases, comes to the following result.

"Perhaps the cases may be reconciled by supposing that where the disposition of the deceased's estate is made in due course of administration, and is therefore such as the party would have been compelled to make had he been the lawful representative of the estate at the time, it is binding on him in his new capacity of rightful administrator; but where it is not made in due course of administration, or is prejudicial to the estate of the deceased, and therefore, so far from being such as he would have been compellable to make in the character of lawful representative, is one which he

would have incurred a personal responsibility in making, on the ground of its amounting to a devastavit, he is not bound thereby after he becomes rightful administrator; inasmuch as his duty to the estate he represents calls on him to rescind the supposed transaction."

We should be glad to continue our quotations, but our limits preclude us from so doing; and we must therefore conclude with a warm recommendation of the work.[1]

ART. V.—PURCHASES BY TRUSTEES OF TRUST PROPERTY.

If a person whose duty to the owner of property gives him an opportunity of knowing the value thereof, or requires him to get the best price for the same, purchases such property, the purchase may be impeached and set aside. Hence trustees whose duties bring them into contact with the property of their cestuis que trust, or who are entrusted with the sale thereof, and the agents of such trustees, auctioneers, and agents generally,[2] commissioners of bankrupt,[3] assignees of bankrupts estates,[4] solicitors,[5] arbitrators,[6] creditors consulted by assignees as to the mode of sale,[7] parties whose consent is required to a sale,[8] must be considered as persons who cannot purchase the property of their respective cestuis que trust without incurring the liability of having the circumstances inquired into. Nor should such persons purchase as the agents of others, or otherwise act on behalf of the purchaser.[9] And the rule is the same though the sale is by auction and before the master.[10] But such purchases must be divided into two classes; 1. Where the cestui que trust is *sui juris* and competent to manage his property, and to contract for the sale thereof. 2. Where the cestui que trust is not *sui juris* or is

[1] Since this article was in print, another work has reached us, entitled, *Practical Rules for determining Parties to Actions: digested and arranged, with Cases. By Herbert Broom, of the Inner Temple, Esq., Barrister at Law.* It appears to be executed with care, and displays both learning and ingenuity.

[2] Rex v. Lord Duncannon, 1 Dru. & War. 509, 541.

[3] Ex parte Bennett, 10 Ves. 381.

[4] Ex parte Lacy, 6 Ves. 625; Ex parte Alexander, 2 Mont. & Ayr. 492.

[5] Gibson v. Jeyes, 6 Ves. 266; Uppington v. Bullen, 2 Dru. & War. 184; Ex parte Town, 2 Mont. & Ayr. 29; Jones v. Thomas, 2 You. & Coll. 498.

[6] 2 Ball. & Be. 116. [7] Ex parte Hughes, 6 Ves. 616. [8] 3 Bea. 49.

[9] 9 Ves. 248, 10 ib. 381.

[10] Ex parte James, 8 Ves. 337, 348; Wren v. Kirton, ibid. 502.

not consulted as to the sale. In the first case the purchase may be impeached, but it depends upon the circumstances, whether it is set aside or not. If there has been a fair open treaty and contract as between two independent persons, and the purchaser has not kept back any material information respecting the property, the purchase will be sustained.[1] A contrary rule would be injurious to the very persons whose interests it is important to protect; for it would prevent them selling to those whose very knowledge of the property may induce them to give a higher price than any stranger would do. But of course such a purchase is not to be recommended, for it exposes the purchaser to great difficulty and expense. If he is brought before the court, the transaction is viewed with a jealous eye. And if he has concealed any important fact, as that he may resell the estate with a profit, or if the vendor was his ward, and he has recently attained his majority, or if the purchase is made apparently by a stranger but in fact on behalf and for the benefit of the trustee, or if the consideration is untruly stated,[2] the court will at once decree a reconveyance.

Lord Eldon observed,[3] "it is necessary to say broadly, that those who meddle with such transactions take upon themselves the whole proof that the thing is righteous. The circumstances that pass upon such transactions may be consistent with honest intentions, but they are so delicate in their nature, that parties must not complain of being called on to prove they are so." . . . . "It has been truly said an attorney is not incapable of contracting with his client; he may for a horse, an estate, &c. A trustee may also deal with his cestui que trust; but the relation must be in some way dissolved; or if not, the parties must be put so much at arms length, that they agree to take the characters of purchaser and vendor; and you must examine whether all the duties of those characters have been performed."

In Lord Selsey v. Rhoades,[4] which was affirmed in the House of Lords, a bill to set aside the lease of a farm granted

[1] Coles v. Trecothick, 9 Ves. 234; Lord Selsey v. Rhodes, 2 Sim. & St. 41. 2 Dru. & War. 38.

[2] 2 Dru. & W. 187.

[3] Gibson v. Jeyes, 6 Ves. 276.

[4] 2 Sim. & Stu. 41, and see 2 Dru. & War. 38.

to a steward by his employer was dismissed; although the lease was for a longer term than was usual on the estate, and was granted on the solicitation of the steward on an agreement made before the subsisting lease had expired, and at a rent lower than was offered to the steward by the occupying tenant; it appearing that the rent to be paid by the steward had been fixed by a surveyor named for that purpose by the employer, and on a valuation made in the manner usual with that surveyor, and the offer of a higher rent being known to the employer before he executed the lease.

Though a party may cease to be a trustee or solicitor, his previous fiduciary character will prevent him contracting with his former cestui que trust, free from the risk of being required to shew that his conduct was unimpeachable, and the contract a fair one. "With respect to the question now put, whether I will permit Jones, [solicitor to assignees of a bankrupt,] to give up the office of a solicitor and to bid, I cannot give that permission. If the principle is right, that the solicitor cannot buy, it would lead to all the mischief of acting up to the point of sale, getting all the information that may be useful to him, then discharging himself from the character of solicitor, and buying the property. Infinite mischief would be the consequence in a number of cases."[1]

If the cestuis que trust be a body of creditors, Lord Hardwicke held that the majority could authorise a sale to a trustee or assignee,[2] but Lord Eldon said he had considerable doubt whether the majority could in that article bind the minority.[3] If this latter opinion be correct, it of course practically places property held in trust for a numerous body of creditors, so far as the rule we are now considering is concerned, in the situation of property held in trust for a person not *sui juris*.

Where a power is given by a settlement to trustees to sell the estate with the consent of the tenant for life, the estate may be purchased by the tenant for life himself.[4] But this must not be considered as establishing a general rule that a party merely entrusted with a power to consent may purchase;

[1] Per Lord Eldon in ex parte James, 8 Ves. 352. See 4 Myl. & Cr. 277.
[2] Whelpdale v. Cookson, 1 Ves. sen. 9.
[3] 6 Ves. 627. See ex parte Bage, 4 Madd. 459.
[4] Howard v. Ducane, Turn. & Russ. 81.

for in the case just put it may be justly said that the consent of the tenant for life is rather required for his own protection than for the benefit of others, and therefore *qua* the consent he is not a trustee: besides, in the case just cited Lord Eldon relied much upon the practice of conveyancers, which he did not think it safe to unsettle. It is quite clear where a consent is vested in a party merely as a trustee, and to protect the interests of others, he cannot exercise such consent for his own benefit.[1]

Under this head we may properly remember the doctrine of courts of equity with respect to gifts to persons whose duties may enable them to acquire an influence over the donors.

In Bridgeman v. Green,[2] Lord C. J. Wilmot, having mentioned the distinction of the Roman law between liberality and profusion, says, "our laws strike no such boundary—*stat pro ratione voluntas,* is the law with us; and this court never did, not ever will, annul donations merely as being improvident, and such as a wise man would not have made, or a man of very nice honor have accepted: nor will this court measure the degrees of understanding; and say that a weak man, provided he is out of the reach of a commission, may not give as well as a wise man. But though this Court disclaims any such jurisdiction, yet, where a gift is immoderate, bears no proportion to the circumstances of the giver, where no reason appears, or the reason given is falsified, and the giver is a weak man, liable to be imposed upon, this Court will look upon such a gift with a very jealous eye; and very strictly examine the conduct of the persons in whose favor it is made; and if it sees that any arts or stratagems, or any undue means have been used, if it sees the least speck of imposition at the bottom, or that the donor is in such a situation with respect to the donee, as may naturally give an undue influence over him, if there be the least *scintilla* of fraud, this court will and ought to interpose; and by the exertion of such a jurisdiction they are so far from infringing the right of alienation, which is the inseparable incident of property, that they act upon the principle of securing the full, ample, and uninfluenced enjoyment of it."

[1] Greenlaw v. King, 3 Bea. 49. See Grover v. Hugell, 3 Russ. 428.

[2] 2 Ves. Sen. 627. Wilmot's Opinions, 58.

Hence, then, a gift to a clergyman, confessor,[1] physician, surgeon, solicitor, agent, butler,[2] or, in fact, to any person whose situation gives him an opportunity of acquiring an undue influence, may be impeached. The question in such cases is not merely whether the donor knew what he was doing, had done, or proposed to do, but how the intention was produced; whether all that care and providence was placed round him as against those who advised him, which from their situation and relation with respect to him, they were bound to exert on his behalf. "Repeating, therefore, distinctly, that this court is not to undo voluntary deeds, I represent the question thus;—whether she executed these instruments not only voluntarily, but with that knowledge of all their effect, nature, and consequences, which the defendants (a clergyman who acted as an agent, and an attorney) were bound by their duty to communicate to her before she was suffered to execute them."[3]

An annuity secured to a surgeon in consideration of his future attendance was set aside on the ground that the patient must have executed the deed in the hope of a prolonged life, whereas it was proved that the surgeon knew he could not live long.[4] Here there was a fraudulent concealment of a most important fact.

After the death of a patient a surgeon produced an agreement in writing which secured to him a very large sum of money; Lord Cottenham, C. observed[5] "when I find an agreement so extravagant in its provisions, secretly obtained by a medical attendant from his patient of a very advanced age, and carefully concealed from his professional advisers and all other persons, and have it proved that the habits, views, and intentions of the testator were wholly inconsistent with those provisions, I cannot but come to the conclusion that the medical attendant did obtain it by some dominion exercised over his patient. How it was effected, whether by direct fraud or by what other means, the defendant has, by the

[1] Middleton v. Sherburne, 4 You. & Coll. 358.
[2] Bridgman v. Green, 2 Ves. sen. 627.
[3] Per Lord Eldon in Huguenin v. Baseley, 14 Ves. 300.
[4] Popham v. Brooke, 5 Russ. 8.
[5] Dent v. Bennett, 4 Myl. & Cr. 277.

secrecy of the transaction, prevented my having any testimony. By that he cannot profit, the conclusion being, I think, satisfactorily established." The agreement was held to be void. Here there was an immoderate gift obtained by one whose situation naturally gave him influence; hence the court viewed it with a very jealous eye, and finding that it was contrary to the habits and expressed feelings and intentions of the donor, and that there was no evidence in its favour, it concluded that it had been fraudulently obtained and therefore set it aside.

Of course a solicitor or surgeon is not incapacitated from receiving a gift from his client, either by deed or will, but if the gift be of any moment the onus lies upon the recipient of showing that the donor was a free and competent agent, and that there was no concealment of any important fact; and the larger the gift the stronger should be the evidence that it was not procured by any unworthy means.[1]

With respect to wills there are two important rules. The first, that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. The strict meaning of the term "*onus probandi*" is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases this *onus* is imposed on the party propounding a will; it is, in general, discharged by proof of capacity and the fact of execution; from which the knowledge of and assent to the contents of the instrument are assumed; and it cannot be that the simple fact of the party who prepared the will, being himself a legatee, is in every case and under all circumstances, to create

[1] Pratt v. Barker, 1 Simons, 1; S. C. 4 Russ. 507. With respect to Wills see Butlin v. Barry, 1 Curt. 614, 637, 784.

a contrary presumption, and to call upon the Court to pronounce against the will, unless additional evidence is adduced to prove the knowledge of its contents by the deceased: a single instance of not unfrequent occurrence will test the truth of this proposition; a man of acknowledged competence and habits of business, worth 100,000*l.* leaves the bulk of his property to his family, and a legacy of 50*l.* to his confidential attorney, who prepared the will; would this fact throw the burthen of proof of actual cognizance by the testator of the contents of the will on the party propounding it, so that if such proof were not supplied, the will would be pronounced against? The answer is obvious, it would not. All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance of more or less weight, according to the facts of each particular case; in some of no weight at all, as in the case suggested, varying according to circumstances; for instance, the quantum of the legacy, and the proportion it bears to the property disposed of and numerous other contingencies: but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intention of the deceased.[1]

We now come to the case of a purchase, where either the cestui qũe trust is not consulted, as in case of a sale by a mortgagee under his mortgage deed,[2] or is not *sui juris*, as an infant, *feme covert*,[3] *non compos mentis*, or otherwise. Here it is clear the purchase may be set aside on the mere application of a party beneficially interested, for no circumstances will justify it. The ground on which the disability or disqualification to purchase rests in such a case is no other than that principle which dictates that a person cannot be both judge and party, buyer and seller. No man can serve two masters. He that is entrusted with the interests of others cannot be allowed to make the business an object of interest to himself;

[1] 1 Curt. 638, 640.
[2] Downes v. Glazebrook, 3 Mer. 200.
[3] Scott v. Davis, 4 Myl. & Cr. 87.

because, from the frailty of nature, one who has the power will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is intrusted.[1] So Lord Eldon said, "This doctrine as to purchases by trustees, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this; that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases. The principle has been carried so high, that where a trustee, in a renewable lease, endeavoured fairly and honestly to treat for a renewal on account of the *cestui que trust*, and, the lessor positively refusing to grant a renewal for his benefit, the trustee, as he very honestly might under those circumstances, took the lease for himself: it was held, that even in such a case, it is so difficult to be sure there was not management, a difficulty, that might exist in a much greater degree in many other cases, having the same aspect, that the lease taken by the trustee from a person, who would not renew for the benefit of the cestui que trust, should be considered taken for his benefit; and should be destroyed rather than that the trustee should hold it himself under those circumstances.". (8 Ves. 345.)

A creditor, having taken out execution, may buy the estate sold under the execution:[2] so a mortgagee may contract with the mortgagor for the purchase of the mortgaged premises.[3] It is as well to notice these cases, but they are not exceptions to the rule we have stated, for they do not come within its terms.

We have seen that if a trustee of a lease obtains a renewal in his own name, the new lease is subject to the trusts; but he might purchase the reversion for his own benefit.[4]

Where a purchase may be impeached, the remedy goes to the same persons as were entitled to the estate before the

[1] Argument in York Buildings Company v. Mackenzie, 8 Bro. P. C. 63.

[2] Stratford v. Twynam, Jacob, 418.

[3] Webb v. Rorke, 2 Scho. & Lefr. 673.

[4] Randall v. Russell, 3 Mer. 190; Hardman v. Johnson, ib. 347; Fosbrooke v. Balguy, 1 Myl. & K. 226.

sale.[1] And the remedy is against, not only the purchaser, but any person who may have purchased from him, with notice of his fiduciary character.[2]

If a reconveyance of the property be required, the cestui que trust must repay the original purchase money, and for all substantial improvements; as for the building of a mansion-house, plantation of shrubs, and, in fact, for every improvement which enhances the value of the estate, together with interest on the monies which have been expended; and on the other hand, the purchaser must account for the rents received,[3] and is liable for any deterioration.[4]

If the property has been resold, the cestui que trust may compel the trustee to refund any profit he may have made.[5]

If a purchase be made by a trustee of a cestui que trust *sui juris*, it is apprehended that the right of the latter to set it aside will be barred by acquiescence for a long period, as eighteen years,[6] and that after twenty years the recent statute would preclude the right and remedy, unless fraud be proved.[7] We apprehend any concealment on the part of the trustee of a fact, which it was his duty to communicate, would be deemed a fraud. But if such purchase be made, and the cestui que trust is not *sui juris*, it may be thought that the property will be considered to remain vested in the trustee upon the former trusts;[8] and if so, time will not run against the cestui que trust, until a sale to a purchaser for valuable consideration.[9] But in such a case the cestui que trust may be barred by acquiescence for twenty years or upwards.[10]

Of course, a purchase by a trustee may be confirmed by the cestui que trust; but such confirmation, to be effectual, should be made with a full knowledge of all the circumstances and of the power to set aside the former transaction.[11]

W. C. W.

[1] 3 Sug. V. & P. 239.

[2] 3 Sug. V. & P. 242, 243; Attorney-General v. Lord Dudley, Coop. 146.

[3] 6 Ves. 624; Ex parte Hughes, 6 Ves. 616; Ex parte Bennett, 10 Ves. 381; 6 Madd. 2.

[4] Ex parte Bennett, 10 Ves. 381, 400.

[5] Ex parte Reynolds, 5 Ves. 707; Sanderson v. Walker, 13 Ves. 601; Baker v. Carter, 1 You. & Coll. 250.

[6] Champion v. Rigby, 1 Russ. & Myl. 539.

[7] 3 & 4 Will. 4, c. 27, ss. 24, 26.

[8] See 12 Ves. 369.

[9] 3 & 4 Will. 4, c. 27, s. 25.

[10] Price v. Byrn, 5 Ves. 681; 10 Ves. 427.

[11] Morse v. Royal, 12 Ves. 355.

ART. VI.—ON THE PROTECTION OF MARRIED WOMEN IN CRIMINAL CASES.

SOME doubt appears to have existed from the earliest times as to the degree of exemption from criminal responsibility which our law extends to a married woman, by reason of her supposed subjection to the authority of her husband—a doubt which the recent cases have certainly not tended altogether to remove. We propose shortly to examine the authorities on this subject, and see how far they enable us to arrive at definite and well-grounded conclusions.

The doctrines of the common law in this respect are stated by Lord Hale[1] in the following terms:—

"As to the civil subjection of the wife to the husband: though in *many* cases the command or authority of the husband, either express or implied, doth not privilege the wife from capital punishment for capital offences; yet in *some* cases the indulgence of the law doth privilege her from capital punishment, for such offences as are in themselves of a capital nature; wherein these ensuing differences are observable.

"1. If a feme covert alone, without her husband, and without the coercion of her husband, commit treason or felony, though it be but larceny, she shall suffer the like judgment and execution as if she were sole; this is agreed on all hands. Stamf. P. C. lib. i. c. 19; 15 E. 2. [Fitz. Abr.] Corone, 160.

"2. But if she commit *larceny* by the coercion of her husband, she is not guilty: 27 Assis. 40; and according to some, if it be by *command* of her husband; Ibid.: which seems to be law, if her husband be present; but not if her husband be absent at the time and place of the felony committed.

"3. But the command or coercion of the husband doth not excuse in the case of *treason*, nor of *murder*, in regard to the heinousness of those crimes.—Dalton's Just. cap. 104. [He then refers to the cases of Arden and Somerville, whose wives were attainted with them of treason in the 13 Elizabeth, and of the Countess of Somerset, who was convicted with the Earl of the murder of Sir Thomas Overbury.]

"4. If the husband and wife together commit *larceny* or *burglary*, by the opinion of Bracton, lib. iii. cap. 32, s. 10, both are guilty; and so it hath been practised by some judges; vide Dalt. ubi supra, cap. 104; and possibly in strictness of law, unless the *actual* coercion of the husband appear, she may be guilty in such a case; for it may many times fall out that the husband doth commit larceny by

[1] Pleas of the Crown, Vol. I. p. 45.

the *instigation*, though he cannot in law do it by the *coercion*, of his wife; but the latter practice hath obtained, that if the husband and wife commit burglary and larceny together, the wife shall be acquitted, and the husband only convicted; and with this agrees the old book, 2 E. 3, Corone, 160. And this being the modern practice, and *in favorem vitæ*, is fittest to be followed . . . . . But the indictment stands good against the wife, inasmuch as every indictment is as well several as joint; and as upon such an indictment the wife may be acquitted and the husband found guilty, so *e converso* the wife may be convicted and the husband acquitted; for the indictment is in law joint or several, as the fact happens; and so is the book of 15 E. 2, Corone, 383, and accordingly has been the frequent practice.

"5. But if the husband and wife together commit a treason, murder, *or homicide*, though she only assented to the treason, they shall both be found guilty, and the wife shall not be acquitted upon the presumption that it was by the coercion of her husband, for the odiousness and dangerous consequence of the crime; the same law it is, if she be accessary to murder before the fact.

"6. If the husband commit a felony or treason, and the wife knowingly receive him, she shall neither be accessary after as to the felony, nor principal as to the treason, for such bare reception of her husband; for she is *sub potestate viri*, and she is bound to receive her husband."

The learned author then sets out a record of the 37 Edw. 3, where husband and wife were jointly indicted for receipt of felons, the wife pleaded her coverture at the time of the offence, and the indictment was held insufficient on that ground as against her. Upon which he makes the following observations:—

"1. That the wife, if alone and without her husband, may be accessary to a felony *post factum*. 2. But she cannot together with her husband be accessary to a felony *post factum*, for it shall be adjudged the act of the husband: and this is partly the reason why she cannot be accessary in receipt of her husband, being a felon, because she is *sub potestate viri*. 3. That in this case she was not put to plead to the indictment, not guilty, but took her exception upon the indictment itself; and so note the diversity between an indictment of felony as principal, and the indictment of her as accessary after; for in the former case she shall be put to plead not guilty to the indictment, though it appear in the body thereof that she is covert."

In another part of the same work (vol. i. p. 516,) the author more briefly sums up the existing state of the law:—

"It hath generally now obtained, that a feme covert cannot be guilty of larceny jointly with her husband, because it is presumed to be done by coercion of her husband. But this I take to be only a presumption till the contrary appear, for I have always thought, that if upon the evidence it can clearly appear that the wife was not drawn to it by her husband, but that she was the principal actor and inciter of it, she is guilty as well as the husband; but *stabitur præsumptio donec probetur in contrarium;* neither is the book of 2 E. 3, Corone, 160, to the contrary, but in the book of 27 Assis. 40, where she was indicted alone, inquiry was made whether it was by coercion of her husband."

Mr. Serjeant Hawkins's exposition of the law on this subject is as follows:[1]

"A feme covert is so much favoured in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft, *in company with or by coercion of* her husband. But if she commit a theft of her own voluntary will, or by the bare *command* of her husband, or be guilty of treason, murder, or *robbery*, in company with or by coercion of her husband, she is punishable as much as if she were sole. Also a wife may be indicted together with her husband, and condemned to the pillory jointly with him, for keeping a bawdy house—for this is an offence as to the government of the house, in which the wife has a principal share, and also such an offence as may generally be presumed to be managed by the intrigues of her sex. And generally a feme covert shall answer, as much as if she were sole, for any offence, not capital, against the common law or statute; and if it be of such a nature that it may be committed by her alone, without the concurrence of the husband, she may be punished for it without the husband, by way of indictment."

From the statement of Lord Hale, and the authorities whereon it is founded, the following propositions may be inferred as being really beyond dispute at the present day:—

1. That husband and wife are in *all* cases *indictable together* as *principal* offenders.

2. That wherever the wife commits any offence in the absence of her husband, she is indictable and punishable as if sole; even though it be committed by the procurement of the husband, or consist in her being accessary *before* the fact to his felony.[2]

[1] 1 Hawk. P. C., b. i. ch. i. ss. 9, 13.

[2] See Rex v. Morris, 2 Leach, 1096; R. & R. 270.

3. That a wife cannot be guilty as an accessary after the fact to a felony committed by the husband, by receiving, harbouring, or assisting him.

4. That where she commits any *felony* (with the exception of certain aggravated crimes, to be considered presently) in the presence of her husband, there is by the law of England a *presumption of fact*, in the absence of evidence to the contrary, that she committed it under the coercion of his marital authority;[1] which presumption of fact is, of course, from its very nature, liable to be rebutted by any evidence showing that in fact the wife acted independently of her husband, or was the principal actor in or inciter to the crime.

This last proposition (which is the only one upon which any degree of doubt can be said for a long period to have rested) appears to be fully confirmed by all the subsequent authorities. Thus, where a husband delivered a threatening letter ignorantly, and as the agent of the wife, she alone was held to be punishable; Rex v. Hammond, 1 Leach, 447. So, a married woman, who swore falsely that she was next of kin to an intestate person, and so procured administration to the effects, was held to be responsible for the offence, as being the principal actor, though her husband was with her when she took the oath; Rex v. Dicks, 1 Russell on Crimes, 16. So, in a case tried before the late Mr. Justice Vaughan, at the Kent Spring Assizes, 1838, where husband and wife were indicted jointly for setting fire to a house with intent to defraud an insurance office, it appearing in evidence that the husband, though present, was a bedridden cripple, the learned judge ruled, after conferring with Lord Chief Justice Tindal, that the circumstances repelled the presumption of coercion, and the woman was convicted. In Rex v. Archer, 1 Moody's Crown Cases, 143, the wife was jointly indicted with her husband as a receiver of stolen goods from their two daughters; part of the stolen property was found in the husband's cottage, in a box of which the wife kept the key; but there was some doubt upon the evidence whether she received them in the presence of her husband or not. The judge told the jury, "that although,

[1] It is thus expressed by Brooke in his Abridgment, Coron. 108—"Ratio videtur eo que le ley entend que le feme *ne osa contradire* son baron!" an intendment of law which we are afraid later experience has hardly confirmed.

generally speaking, the law did not impute to the wife those offences which she might be supposed to have concurred in by the coercion or influence of her husband, and particularly where his home was made the receptacle of stolen goods, yet, if the wife appeared to have taken an active and independent part, or to have endeavoured to conceal the stolen goods more effectually than her husband could have done, and by her own acts, she would be answerable as for her own uncontrolled offence." This direction was held to be defective by the judges, on a case reserved, inasmuch as it ought to have been left to the jury to say whether the wife received the goods *in the absence* of her husband; on that ground they held that the conviction could not be supported, even though she might have been the more active agent of the two. This case, therefore, in truth decides nothing with reference to the point now under consideration, and in no degree conflicts with the general proposition we have advanced. Finally, in the recent case of Regina v. Cruse, 8 Car. & P. 546; 2 Mood. C. C. 53, (although it was not necessary to decide this point,) several of the judges intimated opinions strongly confirmatory of the doctrine, that the presumption of coercion arising from the husband's presence is one of fact merely, which may be repelled by evidence of any facts leading to a contrary conclusion.

We have seen that the wife cannot be guilty as an accessory after the fact to the husband's felony, by receiving him: but there is another question of a kindred nature, upon which we are not aware that any recorded authority exists—the bare receipt of stolen goods, with knowledge of the theft, not having been a felony at common law—viz. whether she be indictable, either with the husband or alone, for the felonious receipt of *goods stolen by* the husband; a case which we know to have recently occurred in practice. Lord Hale, we have seen, lays it down that the wife cannot, *together with* her husband, be accessary after the fact to a felony, for that it shall be adjudged the act of the husband. For a joint act of receiving, therefore, he alone could be made answerable; and it is difficult to see how a receiving directly *from him* can be distinguished in principle from a receiving *with him*. If this be so, it would seem that in such a case the wife would

not only have the benefit of the protection arising from the presumption of coercion, but that the indictment, as against her, could not be sustained at all.

What are the cases of felony *excepted from* the protection we are considering, is not made very clear by the text writers. It seems agreed by all that *treason* and *murder* are not within it. Lord Hale, in the passage last cited from him, excludes also "homicide"—that is, felonious homicide, or *manslaughter;* but the authority which he there refers to, from Dalton, mentions treason and murder only. Hawkins, again, makes the exception to consist of treason, murder, and *robbery;* for the introduction of which last no other authority whatever has been found. In a case mentioned in Kelyng, 31, it was decided by all the judges, that the presumption in favour of the wife applied to *burglary*—an offence equally of a capital nature, and probably not less heinous in the eye of the law than robbery. In Regina v. Williams, 10 Mod. 63, the reason why the wife is excused in the case of burglary is said to be, because she could not tell what property her husband might claim in the goods; a reason absurd on the face of it, and which places the protection on a ground altogether independent of any presumed coercion—namely, on the absence of an animus furandi. In the report of the same case in 1 Salk. 384, there is no mention of this supposed reason, but it is there said that "husband and wife may commit a trespass, murder, or treason." Mr. Justice Blackstone, in one passage, (1 Comm. 444) excepts treason and murder only; in another (4 Comm. 29) he states the exception to be of treason, and also of "crimes that are mala in se, and prohibited by the law of nature, as murder and the like"—a description as vague as it is palpably too wide. In Rex v. Atkinson, 1 Russell, 20, Lord Chief Justice Gibbs extended the protection to the statutable offence of a joint disposing of forged notes. And, having respect to the small number of crimes now capital, and the manner in which the law is administered in those which yet remain so, it is probable that it would now be applied to all cases of felony, except those which, according to all the text writers, are excluded from it—viz. murder and treason.

It is left no less doubtful upon the authorities, how far the protection of a married woman extends to *misdemeanors.* It

was held in the before cited case of Reg. v. Williams, 1 Salk. 384; 10 Mod. 63, that the wife might be convicted with the husband of keeping a brothel, for the reason assigned by Hawkins, that it is an offence as to the government of the house, in which the wife has naturally a principal share. In Rex v. Dixon, 10 Mod. 335, she was held equally to be punishable with him for keeping a *gaming-house*—an offence to which the same reason has very little application. In Regina v. Ingram, 1 Salk. 384, husband and wife were held to be properly convicted of a joint assault; and so also in the before mentioned case of Regina v. Cruse. And Blackstone (1 Comm. 28) states the law to be, that the wife may be guilty with the husband of all *inferior* misdemeanors—instancing the case of the keeping of a bawdy-house. In Lambe's case, Moore, 813, a married woman was charged with being the publisher of a libel, and, although held to be indictable, was excused from punishment, not however on the ground of masculine authority, but of feminine ignorance:—"Because she knew not, by reason of the weakness of her sex, whether it was an offence or not to speak that which was a libel, she was admonished without punishment; for Cook, Chief Justice of the Common Pleas, said that *feminæ sunt imbelles, et sine felle;* and he said, 'Femina, si nescit, clericus, miles, et cultor, Parcat ei judex et ultor.'" On the other hand, upon an indictment against husband and wife for uttering counterfeit coin, (Rex v. Price, 8 Car. & P. 19,) the present Common Serjeant, after consulting two of the judges (Bosanquet and Coltman, Js.), directed an acquittal of the wife: and the same had been before ruled by Mr. Justice Bayley, in a case on the Northern Circuit, Rex v. Conolly, Matthews's Criminal Digest, 262. It is obvious that this is an offence separated only by the arbitrary line which now divides felonies and misdemeanors from that of uttering or disposing of forged notes, to which, as we have seen, the privilege has specially been held to apply.

Such is, we believe, an accurate abstract of the authorities on this subject. We leave them with our readers without further comment, hoping that an occasion may arise for settling the doubts which hang upon it.

W.

ART. VII.—TRIAL OF M'NAUGHTON.

Report of the Trial of Daniel M'Naughton. By R. M. Bousfield and R. Merrett. London. Renshaw, 1843.

THE recent trial of M'Naughton was one of absorbing interest in several respects. The circumstances of the offence itself with which he was charged, the daring publicity of its commission, the fair station and fairer character of the victim, and the suspected intent against another more important life, could not fail to fix public attention on it. To this deep but transitory interest was added one more permanent, as the nature of the inquiry into M'Naughton's guilt necessarily led to a close investigation of the principles by which our English law defines, or affects to define, the extent to which unsoundness of mind must go, in order to exempt homicides from liability to punishment. We propose, though briefly, to consider how far those principles have been elucidated by the discussion and evidence upon the trial, the intrinsic worth of the principles themselves, and the consequences to which they necessarily lead; and then to offer a few remarks on the expediency and practicability of an improvement of the law in this respect. For this purpose a very short statement of the circumstances under which the homicide was perpetrated will suffice.

On the 20th of January, in open day, and in a crowded thoroughfare, M'Naughton put an end to the existence of Mr. Drummond, by discharging a pistol loaded with ball into his back. M'Naughton showed no inclination to conceal the author of the deed, or to escape after firing, but was in the act of discharging a second pistol at his victim when arrested by the bystanders. This was all the material evidence relating to the killing itself.

The Solicitor-General, Sir W. Follett, who conducted the prosecution, stated in the outset that the defence would rest on the plea that the prisoner was insane at the time the act was committed, and accordingly proceeded in his speech to state his view, of the law as relating to such defence. It was, he observed, a difficult one at all times; for while on the one hand, every body must be anxious that an unconscious being

should not suffer, yet, on the other hand, the public safety required that this defence should not be too readily listened to; and above all, the public safety required that the atrocious nature of the act itself, and the circumstances under which it was committed, should not form any ingredient in that defence. His own view of the law respecting it is contained in the following sentence. "The whole question will turn on this:—if you believe the prisoner at the bar at the time he committed this act was not a responsible agent—if you believe that, when he fired the pistol, he was incapable of distinguishing between right and wrong—if you believe that he was under the influence and control of some disease of the mind, which prevented him from being conscious that he was committing a crime--if you believe that he did not know he was violating the law both of God and man—then undoubtedly he is entitled to your acquittal. But it is my duty, subject to the correction of my lords and to the observations of my learned friend, to tell you that nothing short of that will excuse him upon the principle of the English law."

Sir W. Follett then quoted with approbation the dictum of Lord Hale, respecting the difference between partial and total insanity, and as to the former not excusing men in matters capital, and proceeded to review the cases of Lord Ferrars[1] and Bowler,[2] where the defence of insanity had failed. In noticing that of Hadfield,[3] he commented on the doctrine of Lord Erskine, introduced into his celebrated speech on that occasion; that to make out the defence of insanity, it must be shown that the prisoner laboured under a delusion, and that he committed the act in consequence of that delusion. "A party," said Sir William, "may have that state of mind which would render him wholly unconscious of right and wrong; he may have that state of mind which makes him not aware that he is committing a crime, and yet the crime may not be the offspring of any delusion he labours under; nor do I think it right in another point of view. I think that parties may be liable to be punished under the law, although they did labour under a delusion, and although the act may have

[1] 19 How. St. Tr. 886. [2] Collinson on Lunacy, 673.
[3] 27 How. St. Tr. 1281.

been committed under that delusion. I think, therefore, that the doctrine of Lord Erskine is not true in either way to its fullest extent." He next referred to the case of Bellingham,[1] and Lord Mansfield's statement of the law thereupon, that in order to support this defence, it ought to be proved by the most distinct and unquestionable evidence that the criminal was incapable of judging between right and wrong. It must in fact be proved beyond all doubt, that at the time of committing the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature. This doctrine was fully adopted by Lord Lyndhurst on the trial of Offord,[2] who told the jury in summing up that "they must be satisfied before they could acquit the prisoner on the ground of insanity that he did not know when he committed the act, what the effect of it, if fatal, would be, in reference to the crime of murder. The question was, did he know that he was then committing an offence against the laws of God and nature." These, for the purpose of our present inquiry, are the most material passages of the Solicitor-General's address.

Mr. Cockburn, for the defence, was necessarily much more prolix and elaborate. It would therefore too much extend this article to attempt even a summary of the arguments contained in his very admirable speech. Some of those which seem the most important, may however be selected. He first showed the conclusiveness of the defence of insanity in extreme cases. "The law," he said, "takes cognizance of that disease which obscures the intellect, and poisons the very sources of thought and feeling in the human being—which deprives man of reason, and converts him into the similitude of the lower animal—which bears down all the motives which usually stand as barriers around his conduct, and bring him within the operation of the divine and human law—leaving the unhappy sufferer to the wild impulses which his frantic imagination engenders, and which urge him on with ungovernable fury to the commission of acts which his better reason, when yet unclouded, would have abhorred. The law, therefore, holds that a human being in such a state is exempt from

[1] Col. on Lunacy, Add. 636. [2] 5 Car. & P. 168.

legal responsibility and legal punishment: to hold otherwise would be to violate every principle of justice and humanity."

He next proceeded to urge upon the jury the importance and value of medical testimony in a case like the present, as of all the questions which could come before a tribunal of that kind, the question of insanity was one, which (except in those few glaring cases where its effects pervaded the whole of a man's mind) was the most difficult upon which men not scientifically acquainted with the subject could be called upon to decide, and upon which the greatest deference should be paid to the opinions of those who had made madness their peculiar study. He quoted passages from the works of Drs. Ray[1] and Pritchard,[2] showing the untenableness of Lord Hale's distinction as to partial and total insanity, and from Erskine's speech for Hadfield, further showing the untenableness of the proposition laid down both by Lord Hale and Lord Coke, that to protect a man from criminal responsibility, there must be a total deprivation of memory and understanding, whereas such deprivation could only exist in the case of idiots, but no such madness ever existed in the world. He further relied, as applicable to the present case, on Erskine's celebrated definition of that species of insanity where the delusions are "infinitely various and often extremely circumscribed; yet where imagination (within the bounds of the malady) still holds the most uncontrollable dominion over reality and fact, and these are the cases which frequently mock the wisdom of the wisest in judicial trials; because such persons often reason with a subtlety which puts in the shade the ordinary conceptions of mankind. Their conclusions are just and frequently profound, but the premises from which they reason when within the range of the malady, are uniformly false—not false from any defect of knowledge or judgment, but because a delusive image, the inseparable companion of real insanity, is thrust upon the subjugated understanding, incapable of resistance because unconscious of attack. Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity; and when it cannot be predicated of a man standing for life

[1] Treatise on the Medical Jurisprudence of Insanity. Boston, 1838.

[2] On the different Forms of Insanity in relation to Jurisprudence. London, 1842.

or death for a crime, he ought not, in my opinion, to be acquitted; and if courts of law were to be governed by any other principle, every departure from sober rational conduct would be an emancipation from criminal justice."

Mr. Cockburn then passed in review the cases mentioned by the Solicitor-General, strongly remarking on the injustice of the sentence in Bowler's case, and quoting the exclamation respecting it of Mr. Baron Alderson on Oxford's trial—"Bowler, I believe, was executed, and very barbarous it was." He concluded this review by saying, "So much, gentlemen, for the legal authorities cited by my learned friend, the Solicitor-General; but after all, as was observed by him, this is not a question so much of law as of fact. That which you have to determine is, whether the prisoner at the bar is guilty of the crime of wilful murder. Now by 'wilful' must be understood not the mere will that makes a man raise his hand against another; not a blind instinct that leads to the commission of an irrational act—because the brute creation, the beasts of the field, have in that sense a will;—but by will, with reference to human action, must be understood the necessary moral sense that guides and directs the volition acting on it through the medium of reason. I quite agree with my learned friend that it is a question—being namely, whether this moral sense exists or not—of fact rather than of law. At the same time, whatever light legal authorities may afford on the one hand, or philosophy and science on the other, we ought to avail ourselves of with grateful alacrity. This being premised, I will now take the liberty of making a few general observations upon what appears to me to be the true view of the nature of this disease, with reference to the application of the important principle of criminal responsibility. To the most superficial observer, who has contemplated the mind of man, it must be perfectly obvious that the functions of the mind are of a twofold nature—those of the intellect or faculty of thought alone—such as perception, judgment, reasoning; and again, those of the moral faculties—the sentiments, affections, propensities, and passions, which it has pleased Heaven, for its own wise purposes, to implant in the nature of man. It is now received as an admitted principle by all inquirers, that the seat of the mental disease termed insanity

is the cerebral organization; that is to say, the brain of man. Whatever and wherever may be the seat of the immaterial man, one thing appears perfectly clear to human observation, namely, that the point which connects the immaterial and the material man is the brain; and furthermore it is clear that all defects in the cerebral organization, whether congenital—that is to say, born with a man—or supervening either by disease, or by natural and gradual decay, have the effect of impairing and deranging the faculties and functions of the immaterial mind. The soul is there as when the Maker first breathed it into man; but the exercise of the intellectual and moral faculties is vitiated and disordered. Again, a further view of the subject is this—it is one which has only been perfectly understood and elucidated in its full extent by the inquiries of modern times. By any one of the legion of casualties by which the material organization may be affected, any one or all of these various faculties of the mind may be disordered —the perception, the judgment, the reason, the sentiments, the affections, the propensities, the passions—any one or all may become subject to insanity; and the mistake existing in ancient times, which the light of modern science has dispelled, lay in supposing that, in order that a man should be mad—incapable of judging between right and wrong, or of exercising that self-control and dominion, without which the knowledge of right and wrong would become vague and useless—it was necessary that he should exhibit those symptoms which would amount to total prostration of the intellect: whereas modern science has incontrovertibly established that any one of these intellectual and moral functions of the mind may be subject to separate disease, and thereby man may be rendered the victim of the most fearful delusions, the slave of uncontrolable impulses, impelling or rather compelling him to the commission of acts, such as that which has given rise to the case now under your consideration."

Mr. Cockburn next proceeded to point out what he conceived to be the exact question in M'Naughton's case. The question was not whether that individual knew that he was killing another when he raised his hand to destroy him, although he might be under a delusion, but whether under that delusion of mind he did an act which he would not have done under any other circumstances, save under the impulse which

he could not control, and out of which delusion alone the act itself arose. He remarked on the general sensibility to the distinctions between right and wrong shown by lunatics labouring under some particular delusion, and quoted the observation of Dr. Ray, that "their abstract conceptions of crime not being perverted by the influence of disease, present its hideous outlines as strongly defined as ever they were in the healthiest condition; and the disapprobation they express at the sight arises from sincere and honest convictions. The *particular* criminal act however becomes divorced in their minds from its relations to crime in the *abstract*, and being regarded only in connection with some favourite object which it may help to obtain, and which they see no reason to refrain from pursuing, is viewed in fact as of a highly laudable and meritorious nature."

After a further analysis of the investigation of modern science on the subject of insanity, he stated this as the practical conclusion—that a man, though his mind might be sane upon other points, might by the effect of mental disease be rendered wholly incompetent to see some one or more of the relations of subsisting things around him in their true light, and, though possessed of moral perception and control in general, might become the creature and the victim of some impulse so irresistibly strong as to annihilate all possibility of self-dominion or restraint in the particular instance; and this being so, it followed that if under such an impulse a man committed an act which the law denounces and visits with punishment, he could not be made subject to such punishment, because he was not under the restraint of those motives which could alone create human responsibility. "If then," said Mr. Cockburn, "you shall find in this case that the moral sense was impaired, and that this act was the result of a morbid delusion, and necessarily connects itself with that delusion; if I can establish such a case by evidence so as to bring myself within the interpretation which the highest authorities have said is the true principle of law, as they have laid it down for the guidance of courts of law and juries in inquiries of this kind, I shall feel perfectly confident that your verdict must be in favour of the prisoner at the bar."

Such were the principal observations by which the learned counsel on either side introduced this case to the jury. It

must be next our task to give a short abstract of the portions of evidence relating to and illustrating those observations.

The general evidence of the prisoner's sanity produced on the part of the prosecution was not of a very important nature. There appeared to be no doubt that he had been vigilant, active, and successful in business till he gave it up two years before, careful and parsimonious in his management of the money to the amount of some hundreds which he had amassed thereby; but no evidence was given, nor, from the reserved and retired nature of his habits, did it seem possible to give any, that he appeared to any person, in intimate and frequent intercourse with him, a man of perfectly sound mind and understanding. Occasional acquaintances, however, and the landlady with whom he lodged for many months before the commission of the act in question, deposed that they never saw any thing in his conduct and demeanour leading to a belief that he was insane. Evidence notwithstanding, tending in some degree to that conclusion, appeared from the case for the prosecution. But this previously to the homicide was very slight. It amounted only to the proof that his head seemed very bad when he was ill, that he used to moan repeatedly at night, that he had a habit of knitting his brows and rolling his eyes, which wore a staring and glazed appearance.

Subsequently to the homicide it was stronger. When apprehended, and on his way to confinement, he was heard to say, "He (or she) shall not break my peace of mind any longer." When brought before the magistrate he made the following statement:—"The Tories in my native city have compelled me to do this. They follow and persecute me wherever I go, and have entirely destroyed my peace of mind. They followed me to France, into Scotland, and all over England; in fact they follow me wherever I go. I cannot get no rest for them night or day. I cannot sleep at night in consequence of the course they pursue towards me. I believe they have driven me into a consumption. I am sure I shall never be the man I formerly was. I used to have good health and strength, but I have not now. They have accused me of crimes of which I am not guilty; they do every thing in their power to harass and persecute me; in fact they wish to murder me. It can be proved by evidence.

That's all I have to say." The morning before he made this statement, according to the evidence of Tierney, inspector of police, the following conversation passed between them. "I said to the prisoner—'I suppose you will assign some reason to the magistrate this morning for the crime you have committed.' He said—'I shall give a reason, a short one.' I then said, 'You might have stated anything you thought proper to me last night after the caution I gave you.' He then told me that he was an object of persecution by the Tories, that they followed him from place to place with their persecution. He seemed inclined to go on with his statement, when I said—'I suppose you are aware who the gentleman is you shot at?' He said, 'It is Sir Robert Peel, is it not?' I at first said 'No,' but in a moment recollecting myself said, 'We don't exactly know who the gentleman is yet.' Then turning round, I said, 'Recollect the caution I gave you last night, not to say anything to criminate yourself, as it may be used in evidence against you:' to which he immediately replied, 'But you wont use this against me?' I said, 'I make you no promise, I gave you the caution.'" It is to be observed that this confession, if it can be called one, ought to have had but little weight with the jury, extracted as it was in an improper and treacherous manner. If believed, it could only be material as showing a consciousness and dread of consequences on the part of the prisoner.

There was also much evidence to show that M'Naughton had been loitering about the Council Office for many days previous to the act, and giving, when questioned, false excuses for his presence there. Nothing else material as to his sanity appeared from the case for the prosecution.

The evidence for the defence was of a very different character. Daniel M'Naughton, the prisoner's father, deposed to various conversations between them, about two years before, in which his son complained of the various persecutions against him, and begged him to complain to the authorities of Glasgow on the subject. On one of these occasions the following was stated to have passed. "He then said that the persecution still continued, and that he was followed day and night by spies; wherever he went they followed him. I asked him who the spies were, whether he knew any of

them, and whether he could point them out? To which he replied, that it would be quite useless to point them out, as they were always in his presence, wherever he might be, whenever he turned round there they were. I asked him whether he ever spoke to them, or they to him? He said they never spoke to him, but whenever he looked at them they laughed at him, and shook their fists in his face, and those who had sticks shook them at him. He also said that one of the men, whenever he looked at him, threw straws in his face. I asked him whether, if I went out with him, he could point out any of the spies to me? He said, Oh no, if they see any one with me they will not follow at all; it is only when I am alone that they follow and annoy me. I then asked him what he thought they meant by showing him straws? To which he replied, he presumed it meant that he was to be reduced to a state of beggary by them." On many subsequent occasions he made the same complaints of persecution, and was constantly soliciting his father to prevail upon the magistrates to interfere on his behalf.

William Gilchrist, a printer, who had lodged with him, deposed to incoherent ejaculations, immoderate fits of laughter without cause, and admiration of Sir Robert Peel.

Other witnesses also spoke to his continual complaints of persecution by spies, following him wherever he went. One of them, Carlo, alleged him to have said, "that if he could once set eyes upon them, they should not be long in the land of the living."

Mr. Bell, sheriff depute for Lanark, Mr. Johnston, M. P., Sir James Campbell, Lord Provost, the Rev. Alexander Turner, Minister of the Gorbals, Hugh Wilson, Commissioner of Glasgow police, all gave account of various applications made to them by the prisoner, to interfere and put a stop to the persecutions by which he was overwhelmed. The last witness stated that he complained of Catholics and Jesuits, as among the parties who annoyed him.

The remainder of the evidence, material for the defence, came from the medical witnesses. Dr. Munro, who had with others examined him in prison, gave the following account of his answers: "In reply to the questions put to him, the prisoner said that he was persecuted by a system or crew at

Glasgow, Edinburgh, Liverpool, London, and Boulogne. That this crew preceded or followed him wherever he went; that he had no peace of mind, and he was sure it would kill him; that it was a grinding of the mind. I asked him if he had availed himself of medical advice? He replied, that physicians could be of no service to him, for if he took a ton of drugs, it would be of no service to him; that in Glasgow he observed people in the streets pointing at him and speaking of him. They said that is the man, he is a murderer and the worst of characters. That every thing was done to associate his name with the direst of crimes. He was tost like a cork on the sea, and that wherever he went in town or country, on sea or shore, he was perpetually watched and followed. At Edinburgh he saw a man on horseback watching him. That another person there nodded to him, and exclaimed 'That's he.' That he had applied to the authorities at Glasgow for protection and relief. His complaints had been sneered and scouted at by Sheriff Bell, who had it in his power to put a stop to the persecution if he liked. *If he had had a pistol in his possession, he would have shot Sheriff Bell dead as he sat in the court-house:* that Mr. Salmond, the procurator fiscal, Mr. Sheriff Bell, Sheriff Alison, and *Sir Robert Peel,* might have put a stop to this system of persecution if they would; that on coming out of the Court-house he had seen a man frowning at him, with a bundle of straw under his arm; that he knew well enough what it meant; that every thing was done by signs; that he was represented to be under a delusion; that the straw denoted that he should lie upon straw in an asylum; that whilst on board the steam-boat, on his way from Glasgow to Liverpool, he was watched, eyed, and examined closely by persons coming near him; that they had followed him to Boulogne on two occasions; they would never allow him to learn French, and wanted to murder him. He was afraid of going out after dark for fear of assassination; that individuals were made to appear before him like those he had seen at Glasgow. That he had seen paragraphs in the Times newspaper, containing allusions which he was satisfied were directed at him; he had seen articles also in the Glasgow Herald, beastly and atrocious, insinuating things untrue and insufferable of him; that on one or two occasions something

pernicious had been put into his food; that he had studied anatomy to obtain peace of mind, but he had not found it. *That he imagined the person at whom he fired at Charing-cross to be one of the crew—a part of the system that was destroying his health.*"

The following was a part of the cross-examination of Dr. Munro by the Solicitor-General:

"Did you ask him if he knew whom he fired at?

"A. I am not quite certain. I think I asked the prisoner whom he fired at.

"Did any one present ask the prisoner, if he knew it was Sir Robert Peel he shot at?

"A. I think he was asked the question more than once. He hesitated and paused, and at length said he was not sure whether it was Sir Robert Peel or not. This was asked in my presence. * * *

"Did he not say he would not have fired if he had known that it was not Sir Robert Peel?

"A. No; I think he did not. On this point he observed, that the person at whom he fired gave him as he passed a scowling look. *At that moment all the feelings of months and years rushed into his mind, and he thought he could only obtain peace by shooting him.*"

It remains only to relate the opinions as to the prisoner's state of mind formed by the medical witnesses, either upon personal examination, hearing the evidence on the trial, or from the act itself.

Dr. Munro said, that he had not a shadow of a doubt that the delusions were real and not assumed. That in many instances he could satisfy himself as to a person's state of mind, by merely going into a cell and putting questions to him. That *the act with which the prisoner was charged,* coupled with the history of his past life, left not the remotest doubt on his mind of the presence of insanity sufficient to deprive him of all self-control. He considered the act of the prisoner in killing Mr. Drummond to have been committed whilst under a delusion; that the act itself he looked upon as the crowning act of the whole matter—as the climax—as a carrying out of the pre-existing idea which had haunted him for years.

Sir A. Morrison, who also saw M'Naughton in prison, said, that upon that examination, and also upon the evidence he

had heard, his opinion was, that the prisoner was insane; that he concurred intirely in the evidence of Dr. Munro; that the prisoner's morbid delusion consisted in his fancying himself subject to a system of persecutions, and that the effect of this delusion was, to deprive the prisoner of all restraint or control over his actions. Of this the witness had not the slightest doubt.

Mr. M'Clure, who also saw the prisoner, considered, looking at the history of the case, the evidence adduced, as well as the melancholy termination, that when he fired at Mr. Drummond, he was suffering from a hallucination which deprived him of all ordinary restraint, and that his moral liberty was destroyed.

Dr. Hutchenson, who also saw the prisoner, considered his delusions real, and sufficient to account for the act with which he was charged. They had the effect of depriving him of all control over his actions. This act flowed immediately from the delusion, and was its consequence, which was irresistible. The delusion was so strong, that nothing but a physical impediment could have prevented him from committing the act.

Dr. Crauford concurred in this opinion.

Mr. M'Murdo, the surgeon of Newgate, who had seen the prisoner daily, considered him insane when he shot Mr. Drummond, and that he, the prisoner, believed, *that he was acting in self-defence, and correctly.*

Mr. Aston Key, from hearing the evidence at the trial, believed that when M'Naughton shot Mr. Drummond, he was labouring under a delusion that he was exempt from all responsibility, and had no control over his actions. The witness's judgment was formed mainly on the absence of other motives, besides delusion.

Mr. Winslow, the author of 'The plea of insanity in criminal cases,' judging from the evidence he had heard, had not the slightest hesitation in saying that M'Naughton was insane, and that he committed the offence in question whilst afflicted with a delusion, under which he appeared to have been labouring for a considerable length of time.

Upon the strength of this medical testimony, Tindal, C. J., here interposed, and after hearing his opinion, the Solicitor-General gave up the case for the prosecution.

The Lord Chief Justice, in his short address to the jury, told them that the point he had to submit to them was, whether they were "satisfied that at the time the act was committed, for the commission of which the prisoner now stood charged, he had that competent use of his understanding, as that he knew that he was doing by the very act itself a wicked and a wrong thing. If he was not sensible at the time he committed that act, that it was a violation of the law of God, *or of man*, undoubtedly he was not responsible for that act, or liable to any punishment whatever flowing from that act." If the jury thought, "on balancing the evidence in their minds, the prisoner capable of distinguishing between right and wrong, then he was a responsible agent, and liable to all the penalties the law imposes."

The prisoner was found Not Guilty on the ground of insanity.

On examining the interpretations of the law respecting insanity as a defence in criminal matters, given on this remarkable trial by the counsel on both sides, and more shortly by the judge, no great difference appears between them. Both the Solicitor General and the Chief Justice seem to have been contented to adopt in the main the old tests suggested by Lord Mansfield, and approved of by so many following judges, that, whether the prisoner knew his act to be a crime against the law of "God and nature, and was capable of judging between right and wrong," when he committed it, is the question for the jury. This position Mr. Cockburn did not dispute, and was not called upon directly to dispute, as his defence lay on other ground. But we must be permitted to protest against the doctrine which these phrases involve, and the consequences to which they might lead, if judge or jury really acted on them.

A crime against the law of God! This may mean either God's written or unwritten law. If the latter, it is but a synonyme for the law of nature. If the former, there is no doubt that we find in revelation the most positive commands to do no murder. But does revelation forbid homicide under all circumstances, or does it define all the circumstances according to which homicide is justifiable? As certainly not. And thus we learn from history and experience that there have existed, and do exist, and, as is much to be feared, will hereafter exist, persons, who, in committing or attempting what

is really murder, have no knowledge or belief that they are violating the law of God. Religious, or even political fanaticism, and other causes too, may produce in an ill-regulated mind the firm conviction, that the taking of another's life away is justified, or even required, by circumstances. Is the homicide therefore to be pardoned, and the perpetrator of it absolved, because he did not know his act to be a crime against the law of God?

A crime against the law of nature! There is, as we believe and hope, no question that Divine Providence has implanted in the minds of all men a sentiment of natural benevolence, an informing and regulating conscience, which, apart from the aids of revelation, must generally teach that the slaying of another is a crime. But as certainly as these exist, so are they liable to be obscured, perverted, or even altogether stifled, by peculiar circumstances; and thus the same action has come to be considered in one age or country criminal, in another indifferent, in another even meritorious. This has even been the case with so great a crime as murder, in countries unenlightened by Christianity, as witness the Thuggites and Assassins: and if it is to be hoped that in Christian countries no such extent of delusion could prevail, it would seem to follow that the reason is, because in such the law of God gives a criterion of the law of nature. He therefore who takes a wrong view of the requirements of the one, would take a wrong view of the requirements of the other, but ought not therefore to be excused.

Incapable of judging between right and wrong! If this mean moral right and moral wrong, it is only another expression for testing criminality by a knowledge of the laws of God and nature. If it mean legal right and legal wrong, the test assumes a different and more satisfactory aspect. When Chief Justice Tindal tells the jury that if the prisoner was not sensible when he committed the act, that it was a violation of the law of God *or* of man, he was not responsible for that act, it may fairly be inferred that had he been sensible that his act was a violation of the law of man, he would have been responsible in the learned judge's opinion. And this is surely the most true as well as the simplest mode of stating the proposition, that wherever a man (assumed for the present to be a free agent) commits an homicide, or other act which he

knows by the laws of his country to be punishable with death, he is a proper subject for that punishment. If the law indeed were an unjust or over-severe law, it would be highly desirable that no one should be punished under it, and that it should be altered as speedily as possible, but the individual offending against it cannot be permitted to constitute himself the judge of that. As a member of society he owes obedience to all its laws, and deserves the consequences of infringing them. It is therefore much to be regretted that when the defence of insanity has been set up in criminal trials, judges have not more plainly directed juries to inquire, whether the prisoner was a free agent and knew that he was violating the law of his country, instead of perplexing their understandings by the somewhat vague expressions of the "law of God and nature," the "distinction between right and wrong."

Mr. Cockburn, in his speech for the defence, seems to have passed in review all the forms of insanity constituting criminal irresponsibility. He first noticed that complete prostration of intellect and reason, which all jurists unâ voce have agreed to furnish a valid defence. He then, with the assistance of the able writers whom he quoted, completely demolished the theory of Lord Hale respecting partial and total insanity. And for this there is much reason to thank him. It is to be hoped that that time-honoured but most unfounded dictum may be henceforth consigned to the same repertory of curious things, in which repose his lordship's lucubrations respecting witchcraft, and may be no longer suffered to fling a shadow on the fame of so truly great and wise a judge.

We are rather at a loss to understand why, on the other hand, Mr. Cockburn laboured so much to exalt and glorify the doctrine of Erskine, that false belief or delusion is the inseparable concomitant of real insanity. True, that in the case of M'Naughton there did exist delusion; but nevertheless the doctrine is not true, nor was its error ever exposed more ably than by Mr. Cockburn in the latter part of his speech. He there most eloquently showed (the passage is quoted above) that there is a most fatal and prevalent species of insanity where no delusion exists. This moral insanity, for such it is, consists in the total depravation of some portion of the moral nature, producing an irresistible propensity to some kind of evil, without at all affecting the understanding, so that the

unhappy victim is often fully conscious at the same time of the enormity of his inclination, and of his total inability to restrain it. Nay, one portion of the moral nature is sometimes in arms against the other, so that the uncontrollable appetite of murder, and the most intense horror of the crime, shall be present in the same individual. A large collection of these afflicting cases may be found in Mr. Winslow's recent work,[1] and also in Sampson's Criminal Jurisprudence in relation to mental organization.[2] A less shocking form of the same disease is the propensity to theft, manifested by individuals who are absolutely without temptation. This modern discovery—for such it is, and in ancient times, being unacquainted with it, juries have convicted, and judges executed without remorse in cases of the kind—completely overturns the hypothesis of Erskine,—one indeed not otherwise tenable, for as was well observed by the Solicitor General, a party might labour under a delusion, and do an act in consequence, and yet be sane as to the criminal nature of that act, or, on the other hand, without any delusion, be unconscious whether an act really criminal was right or wrong. Perhaps, however, the able advocate for the defence thought it expedient to ascribe undue authority to Erskine's doctrine, as leading more easily to the deduction, that if insanity and delusion are inseparable, then every act done in consequence of a delusion is necessarily an act of insanity. This, as we shall presently show, was the position, that Mr. Cockburn, though he cautiously and darkly shadows it forth in his speech, had in reality to maintain.

On the general evidence, apart from the medical, respecting M'Naughton's state of mind, it is scarcely necessary to remark. No one who peruses even the brief abstract given above can doubt that he had for a long period of time been subject to the false impression, that he was surrounded by enemies and spies, who harassed him by unremitting persecution, and that he could neither obtain protection or escape from them; as far, therefore, as this false impression extended, that he was undoubtedly of unsound mind. But we look in vain through this portion of the evidence for indications of insanity in any other respect. One witness does in-

[1] The Plea of Insanity in Criminal Cases, London, 1843.

[2] London, Renshaw, 1843.

deed state, that on one occasion M'Naughton observed, if he could once set his eyes upon his enemies, they should not be long in the land of the living, and this was after an exhortation by the witness to have them punished. But there is no reason from the evidence to presume, that M'Naughton entertained any false belief of his right, or power, to destroy his enemies. The strength of the defence lay then in the medical evidence.

Assuredly the somewhat extravagant encomium, passed by the prisoner's counsel at the outset upon the value of scientific testimony in cases of this sort, met with its appropriate reward, as far as the interests of his client were concerned. Confident beyond all usual confidence, positive beyond all ordinary positiveness, were the answers of the medical witnesses. They asserted their metaphysical theory more boldly than common men venture to assert a physical fact. There was no room for doubt, no possibility of error. All of them, with the exception of Messrs. Winslow and Macmurdo, affirmed that Mr. Drummond's murder was not merely the consequence, but the irresistible and inevitable consequence of M'Naughton's particular delusion; and Mr. Macmurdo had his own pet theory, equally beneficial to the prisoner, that when he did the act he believed himself acting in self-defence and correctly. In Dr. Monro's opinion, the act was the crowning act of the whole matter, the climax and carrying out of the pre-existing idea; in Dr. Hutchenson's, nothing but a physical impediment could have prevented him from committing the act. How could jury or judge resist such evidence from such authority? Yet a quiet observer might be tempted to inquire upon what grounds have these gentlemen formed this most positive opinion. They tell us, indeed, that their judgment is infallible in matters of this sort; but as to the reasons of that judgment, they tell us only, that they rely on the nature of the delusion, and the nature of the act itself.

Here it may be remarked in passing that a new reading of the law seems to have been introduced on M'Naughton's trial, with respect to taking the opinion of witnesses on the act itself. The following passage is to be found in the latest legal treatise on insanity:[1]—

[1] Stock on *Non Compotes Mentis*; London. 1838.

"On occasion of a trial for murder, the keeper of a lunatic asylum, after hearing the evidence, offered himself to give an opinion founded on it as to the prisoner's general insanity, and also as to his particular insanity with regard to the act in question; and it was held by the judges, after argument in the exchequer chamber, that a witness of medical skill might be called to give his opinion of a prisoner's general insanity on the evidence he had heard in court. But they doubted whether he could be asked as to the nature of the particular act, as it was that the jury had to try."[1]

This restriction must be considered as overruled by the permitted violation of it in the case of M'Naughton. Nor is the change to be regretted. We entirely agree with Mr. Cockburn in his eloquent attack[2] upon Sir W. Follett's position, that the nature of the act itself should not form any ingredient of the defence, and think it more conducive to the ends of justice that witnesses, called upon to form an opinion as to the prisoner's state of mind, should take into consideration all the circumstances attending his offence.

The most material of those circumstances in the present instance were the insensibility to consequences and the absence of real motive. But first, what was in point of fact the motive, the unreal motive of M'Naughton's act! The medical witnesses seem to have assumed, that it was the persuasion of his mind that Mr. Drummond was one of his relentless spies and persecutors. This is not quite clear from the other evidence. The prevailing character of his delusion, his threat to the witness Carlo, and his positive statements to Dr. Munro, as to feelings of years rising in his mind and forcing him to shoot, are in favour of such a supposition. On the other hand, his loitering for days about the Council Office, as if on the watch for somebody; his conversation with the policeman, if believed, as to Sir Robert Peel being the man he had shot; his hesitation to admit that he so believed in prison; his statement to Dr. Monro, that if he had had a pistol he would have shot Sheriff Bell dead as he sat in the court house, for not listening to his application for protection and relief; and that Sir Robert Peel was one of those who might have put a stop to this system of persecution if he would, point to the conclusion that

[1] Rex v. Wright, R. & R. 456; Rex v. Haswell, ib. 458; Rex v. Searle, 2 M. & M. 75.

[2] Page 53 of Report.

Sir Robert Peel was his intended victim, and that the motive for killing him was, because, having the power, he would not redress M'Naughton's grievances. We incline to the latter explanation of his act. The difference, however, is not very material, and for the purpose of this inquiry it may be assumed, as the witnesses assumed it, that in destroying Mr. Drummond, M'Naughton thought and believed he was destroying one of his spies and persecutors.

This, then, being his motive, and wholly without real foundation, was the act done in consequence of it necessarily on that account an act of insanity! Let us here suppose four cases. The first is that of a man whom a number of persons combine to torment and persecute. He is a man of fair understanding, but of a violent and revengeful temper. The mode of persecution adopted is by insulting words and gestures when they and he meet, following him from place to place as he shifts his position to avoid them; spreading and publishing reports to the injury of his character. His wrath and hatred at this treatment grow from day to day. On one occasion he encounters one of the most active of his enemies, who offers him, by speech or gesture, some fresh insult. In his fury he kills the offender. Here is a very wicked and violent act, proceeding from a strong and real motive; but not the semblance of insanity.

The next is the case of a man of much weaker understanding, but equally violent temper. He has one secret and malicious enemy, under the disguise of a friend. This false friend, for purposes of his own, is constantly instilling into the other's mind suspicion of a certain person or persons. He represents them as engaged in a conspiracy to ruin his worldly prospects, as constantly maligning his character, as behaving themselves towards him when they meet in a rude and insolent manner. There is no real foundation for these insinuations, but the man of weak understanding, trusting in his friend, believes them. A great misfortune, proceeding from an unknown cause, befals him. The false friend asserts that he has proofs that it proceeded from the contrivances of the same enemy or enemies. The credulous man believes this; and whilst still in the height of his indignation, meets an individual accused and destroys him. Here is another wicked and violent act, proceeding

from a strong but unreal motive; but again no semblance of insanity.

The next is the case of a man of the same understanding and temper as the last. From an accidental combination of circumstances calculated to engender suspicion he is led, not unreasonably, to believe that a particular person is his secret enemy, and the author of certain heavy misfortunes which befal him; and this person, in the height of his rage and revenge, he destroys. Here is again another wicked and violent act, proceeding from a strong, unreal, yet in seeming probably real, motive; and again no semblance of insanity.

The last is M'Naughton's case. Here there is no real persecution, nor has the idea of persecution been suggested, as far as we know, by another, or by circumstances calculated to suggest it; it is the product of his own diseased imagination. Does it therefore follow that the act which in the other three cases, however wicked, was a sane one, is necessarily an insane one in him? If so, it is not on account of the unreality of his motive, for in two of the other cases put the motive is equally unreal; and it must therefore be on account of the unreasonableness of his unreal motive. Let us assume it, in his case, to have been wholly unreasonable; that nothing ever happened to him at all calculated to excite suspicion of the kind, but that such suspicion is the wholly groundless product of his own brain. The argument will then stand thus, that where a man, altogether without cause, insanely believes himself to be the object of persecution, and in consequence destroys one of his imagined persecutors, the act of killing is an act of insanity, necessarily resulting from the nature of his delusion.

But if this were so, it would follow that all persons, like M'Naughton, insanely believing themselves the victims of persecution, ought to kill, or strive to kill, their persecutors. All experience, however, is against so monstrous a position. Instances of delusion of this sort are very common; murders in consequence of it happily very rare. Sometimes the unhappy sufferers appear to feel no inclination whatever to take revenge upon their imaginary enemies; sometimes they exhibit the inclination, but appear to be restrained from indulging it by moral and religious considerations. An affect-

ing case of the former description may be found detailed in Winslow's recent work, p. 28.

Many, then, of those who insanely believe themselves the objects of persecution, retain the exercise of their free will so as neither to kill, or to attempt to kill, their persecutors. The argument, therefore, for the non-imputability in M'Naughton's case, arising from the nature of the act itself, taken in connection with the motive, comes to be reduced to this, that when, among persons holding such insane belief, one *does* kill one of his supposed enemies, the act of killing is an act of insanity because he kills, and itself proves him to be irresponsible, as a being without free will or self-control. But if so, what reason is there that the same act should not be held to prove the same irresponsibility in cases where the idea of persecution, though unreal, had some rational foundation, or even in cases where the persecution was real?

The conclusion to which we cannot help coming is this:—That the act of M'Naughton, taken in connection with his delusion, does not *prove* that he was an irresponsible agent at the time;—does not *prove* that he could not help doing it;—does not *prove* that he did not know he was doing wrong;—does not *prove* that he did not know he was violating the law of his country;—and, consequently, does not prove that he was not guilty of wilful murder. But as there is reason to believe that some few persons afflicted with such delusions do lose all moral freedom, or become insensible to the moral quality of their actions, and so take the life of others either under an uncontrollable impulse, or not perceiving that the act is wicked and unlawful, so there arises in the present case a slight but uncertain degree of *probability* that M'Naughton was not guilty of wilful murder.

It may be said this probability is augmented by the declarations of M'Naughton himself after the perpetration of his crime, amounting in substance to the assertion, that he acted under an irresistible impulse. But as there is no indication in the case that his lunacy at all partook of the character of suicidal monomania, no reason to believe that he did not wish to escape punishment, such declarations must be taken subject to the general rule, that no man can make evidence for himself by his own statements. Had indeed such declarations

been made before the perpetration of his crime; had he told others that he felt his state of mind was such he should some day be irresistibly impelled to destroy his persecutors, the evidence would have been more material. But as it is known that lunatics, like other men, constantly manifest great cunning and astuteness in their endeavours to escape the consequences of their bad actions, it cannot, except in cases where the lunatic seems to desire his own death, be held of much importance, that he accounts for his crime by reasons having a tendency to exempt him from punishment.

It is needless to enlarge much upon the conclusion as to M'Naughton's insanity, drawn from the apparent insensibility to consequences shown in the manner of the act. In the first place lunatics not unfrequently exercise a great deal of secrecy and contrivance in the commission of crime. So that it cannot be contended that it is an inseparable characteristic of insanity to neglect all chances of concealment or escape. The indifference to personal consequences depends chiefly upon the motives with which a crime is committed. Where the object is one of physical advantage to the criminal, as the acquisition of money or money's-worth, the crime is usually committed with as much care for self-preservation as possible. But where the object is one of injury to the person assailed, as in crimes proceeding from revenge or malice, self-preservation is frequently but little thought of. The not uncommon feeling of the murderer from such motives is—Let me but succeed in taking away his life, and I care not what becomes of my own. The recklessness of consequences shown by M'Naughton goes but little therefore to enhance the probability of his guiltlessness of murder.

If, then, the only conclusion to which we can safely come upon the evidence in this case is, notwithstanding the oracular dogmatism of the scientific witnesses, that there is only an uncertain degree of probability that M'Naughton was not responsible for killing Mr. Drummond, as being wholly deprived of free will, or wholly unconscious of the criminal nature of his act, the question remains,—how ought criminal justice to deal with such a case? It is not one that can be properly disposed of by an application of the ordinary rule, that where there is a doubt the prisoner is entitled to the benefit of that

doubt with the jury. In all cases of deliberate homicide the English law assumes the perpetrator of that homicide to be guilty of murder; and if he seeks to reduce it to a less offence, on him lies the onus of proving the grounds of extenuation.

But the question is too grave a one to be discussed on merely technical principles. The real inquiry ought to be,—Would it be right to inflict punishment, and if any, what punishment, in such cases? That is, in other words, would it be expedient and would it be just, for it must be both in order to be right.

As to the amount of punishment to be inflicted, if any, on such persons, it seems difficult to suggest any reason why it should vary from that appointed for murder in other cases, or be reduced below death, so long as death continues to be the penalty required by law for crimes of the first magnitude. The infliction of any punishment at all involves the assumption that the party had some free will and consciousness, or at any rate that there is no proof he had not; and to mitigate his sentence under such circumstances would amount to an admission that there might be a partial interruption of free will, extenuatory, though not exculpatory—a modified unconsciousness of guilt; a theory which, if not wholly absurd, must lead to inquiries of metaphysical subtlety quite beyond the province or the comprehension of ordinary human tribunals.

Would it, then, be expedient to punish such cases as M'Naughton's in the same way other homicides are punished! All jurists are pretty well agreed that the expediency of human punishment mainly depends upon two considerations: the benefit to the criminal himself, and the benefit to the community at large. In all cases of capital punishment (and this is one of the most serious objections to it) benefit to the criminal is necessarily out of the question. It remains then only to consider whether such a course may be expected to benefit the community. If it does so, this can only be by its operating as an example to deter others from like crimes, and so effectually protecting the lives of some, and producing a feeling of additional security in all. It is not likely so to operate upon persons of undoubtedly sound mind. As far as

punishment can deter, these will be sufficiently deterred from murder by the knowledge that its general consequence is death to the murderer. Will it then so operate on persons, in some way or other, to some extent more or less, of unsound mind?

There is an old story, in Cervantes we believe, of a lunatic who entertained an insane antipathy to dogs. To gratify this, it was his wont to carry a large stone balanced on his head, and when he saw a dog to allure him by the offer of food or by coaxing gestures to his feet; and then bending his head slightly forward, to let his heavy load fall. In this way he generally contrived to fracture the animal's skull. One day the owner of a dog so treated witnessing the transaction, gave the lunatic a hearty threshing. From that time forth he ceased to carry his large stone; and when he saw a dog in the street, he shook his head, and walked another way. We think that this old story involves the true philosophy of the matter.

That there are some lunatics not to be restrained by fear of punishment from any act they feel an inclination to do is quite beyond dispute. Where the insanity is general, and affects the whole intellectual and moral man, it would be idle to expect any benefit to result from example. In such cases the lunatic does not know and believe in consequences, and if he did he would not heed them. But this is not the common kind of insanity. We are confining our attention to the more usual cases, where there exists a partial delusion, inducing directly or indirectly an inclination to do a particular act. In some instances this inclination may be irresistible, as it is alleged to have been in M'Naughton's case. In others it may be resisted, though more or less strong, according to the strength of the patient's intellect and moral feeling. Accordingly experience teaches us that there are lunatics who, whilst avowing a desire to do an act wholly irrational, and for which they can have no motive except their particular delusion, avow also that they are deterred by fear of consequences; others, from the observation of whose conduct the same thing may be collected, though they do not actually avow it; others, who in threatening the commission of a crime, make a boast of the impunity which they know they shall enjoy on account

of the disease by which they are afflicted.[1] It is impossible to dispute the probability that all these last-named classes of persons would be restrained from crime by the certain expectation of punishment. And even in cases of particular delusion, where it is impossible to collect from the actions or avowals of the lunatic himself, whether he is influenced at all, or how far, if at all, by the fear of punishment or hope of impunity, who shall say what is the real proportion of them on whom such causes would not operate. Of twenty individuals suffering under the same insane belief as M'Naughton, who shall say how many would be prevented from wreaking mortal revenge on the imaginary persecutor, by the knowledge that the law was wont to show no mercy in such cases, and to punish all such deeds as murders. That some would be so restrained it seems impossible to doubt.

What has been the experience of the few weeks that have passed since M'Naughton's acquittal. The daily papers have teemed with instances of persons whose particular delusion being to suppose themselves wronged by a certain individual, have been brought up to the police offices for threatening or attempting his life. Is it accident alone which has produced the amazing increase of such charges since that acquittal; or is it that the disordered imagination craving for crime, has felt a fresh stimulus to the commission in the hope derived from that acquittal, that it too might do the like with impunity? It may be said that it is not the circumstance of the acquittal, but the circumstances of the act of M'Naughton so forced on their attention, that have unusually excited the wild impulses of persons similarly afflicted. But experience does not teach that when a malefactor is tried and executed for revenging a real injury, lunatics, in whose own belief their injuries are equally real, are observed to feel additional appetite for the indulgence of their propensity to revenge.

We consider it then as proved, that the punishment of lunatics for murder would be expedient, (and we have hitherto argued merely of expediency,) inasmuch as it would deter some other lunatics from the like offence. The graver question remains, Would it be just? To answer this correctly it must

[1] See Winslow's Plea, p. 16.

be first ascertained what are the moral conditions which make a human punishment just. And here, unfortunately, moralists are at variance.

There is a class who hold that human justice is but the imperfect copy and imitation of divine, and who claim for human society the exercise of the attribute of divine vengeance. With them it is not the good of the one, or of the many, or of both, that makes a punishment just. To inflict pain on him who gives pain, to make him who does evil suffer evil, not with any ulterior purpose, but because he deserves the pain or evil, is in their minds the true principle of all punishments. All, they consider right, which are in accordance either with particular provisions of the revealed law of God, ordaining certain penalties for certain offences, or with the general provision of that law, ordaining exact retribution. All these, they say, it is the duty of every human tribunal to the utmost of its ability to enforce and carry out. Some of this class being necessitarians, cannot in consistency allow the existence of insanity, if proved, to weigh at all in a prisoner's favour. His life must answer for the life he has taken away. Others, of this class, will hold the punishment of a man in M'Naughton's situation just, or unjust, accordingly as he was found to have, or not to have, the exercise of his free will. And if this fact cannot be ascertained either way, they will hold that there is an equal risk of injustice either in acquitting, or condemning him.

Another class of moralists, of whose opinions Rossi, the renowned French jurist, may be regarded as the most elaborate expositor,[1] hold those punishments only to be just, which the natural conscience of men approves of. There is, according to their doctrine, in the minds of individuals and communities an innate sentiment of justice which infallibly will teach whether a particular act deserves punishment or not. And as it is from the existence of this sentiment that human societies derive their knowledge whether they have a right to punish or not, so from it do they derive all their authority to punish. The maximum to which punishment should be extended in particular cases is pointed out by the same unerring dictates.

[1] Traité de Droit Pénal, Paris.

But the application of it depends on wholly different considerations. Though conscience teach infallibly what actions deserve punishment, and within what limits, it is only with such portion of those actions as are injurious to the community, that the law of that community ought to interfere. Thus utility is made the test of the application of penalties,—conscience, only of the justice of applying them. Persons of this class will maintain that conscience teaches homicide to be a crime, and further teaches that the punishment of death is not too high for it; and that the public weal requires homicide to be so punished. But whether criminals like M'Naughton, whose freedom of will is uncertain, deserve such punishment, remains a question for the state or individual conscience.

Another class of moralists repudiate altogether the idea of punishing an act, because contrary to the divine law, or because condemned by the human conscience. According to them all power and right of retribution are in the hands of God alone. Society has no right to punish, except to prevent an injury to itself; and wherever it can prevent, or even diminish such injury by so doing, it has that right in full perfection. For the benefit of society, therefore, when that benefit can be certainly ascertained, any degree of punishment is just, and may be justly inflicted on any subject. Thus, for the prevention of a crime, it might be just to impose death upon every person whatever that committed it. But though the crime were prevented in nine cases out of ten thereby, it would not therefore certainly be just. For the disposition of the jury to violate their oaths in the tenth case, the shock to the feelings of the public at a penalty disproportionate to the offence, or applied too indiscriminately, and many other bad results, might do to society more injury than the prevention of the particular act did good. The problem, therefore, for the legislature who made, and for the judge who administered the law in any community, would be, how to effect the greatest possible diminution of crime with the least possible disadvantage; and when this problem were once rightly solved, the law of that community would become a perfectly just law: and the sole question with these moralists would be, in considering the justice or injustice of M'Naughton's acquittal, whether the pain to the community, or to a por-

tion of it, resulting from the execution of a man who might not have been a free agent in the commission of his crime, counterbalanced, or not, the advantage of deterring other lunatics from murder through his example. In other words, for the purposes of criminal jurisprudence, justice and expediency are with them convertible terms.

Another class of moralists hold a theory which enables them to arrive very easily at a solution of the question proposed. They deny altogether the right of human society, on any grounds whatever, to punish, in the ordinary sense of the word. In their opinion, those offenders ordinarily deemed sane are not any more than those ordinarily deemed insane fit subjects for criminal responsibility. All guilty inclinations are, according to them, a disease of mind, as strictly speaking as fever is a disease of the body; and it would be just as rational to punish a man for having ague or typhus, as for committing theft or murder. They admit that, as bad habits voluntarily adopted may bring on some forms of disease of the body, so may they that form of disease of the mind called crime; and thus a man be, in a certain sense, responsible either for his corporeal or mental disorder, but they object to making him suffer for either, except to the extent necessary for his cure. The safety of society being first cared for, so far as his bad propensities are concerned, by depriving the moral offender of his personal liberty, the only other end to be sought is, in their opinion, to make him better. For this purpose the strictest discipline may be required, and, if required, is justified; but no privation, no pain is justifiable, that has not a tendency to advance his restoration to sound moral health. Of course, to the holders of this theory, the punishment of death, in any case, seems altogether cruel and unjust; but they will consider cases like M'Naughton's, as exhibiting one form only of the general disease of crime, and not entitled, more than others, to a special exemption from punishment. Such being the more popular theories on the subject of human punishment, it appears that the conclusion as to the propriety of the result of M'Naughton's trial will vary in different minds, and that until society can attain to something like unanimity as to the true theory, its administration of criminal justice (so called) must continue to give

dissatisfaction to a large portion of its members. Yet, however difficult, perhaps impossible, it may be to demonstrate in what degree, if any, the non-application of the law in M'Naughton's case violates the principles of *absolute* justice, it is very possible to ascertain whether it is *relatively* just or not.

We ask, then, if a law can be termed just which spares M'Naughton because there is some probability that the state of his mind deprived him of the exercise of his free will, and which punishes others, where there is the same degree of probability at least, that the state of their circumstances deprived them of the exercise of their free will?

Take, first, the most commonly observed though by no means the strongest case. A man under the cravings of extreme hunger steals food. Is he responsible for this? We must judge as well as we can by our imperfect knowledge of human nature. We know that man, although an animal endowed with reason, has still, in common with other animals, an instinct of self-preservation, like other instincts, irresistible. We know that men, otherwise virtuous and humane to the average extent, have in numerous cases been driven by hunger to become homicides and cannibals. Is there not, then, a considerable probability that the theft proceeded from an uncontrollable impulse, and if so, how can it be justly punished if M'Naughton's act is not? But the law says to the thief, the circumstances cannot excuse your offence, though in my mercy they may perhaps be allowed to mitigate your sentence.

Take a less obvious but really stronger case. A child is born in one of those low and loathsome districts of this great metropolis, where every second man you meet is a felon in act or intention, to parents even there remarkable for pre-eminence in guilt and infamy. From infancy his senses are accustomed to every form and variety of vice. When he attains the age of reason—if a being wholly without moral or mental culture can be said ever to attain the age of reason—he is taught to regard crimes against property as highly meritorious, crimes against the person as at least indifferent. Without being permitted any option, which however he is little likely to desire, he is himself gradually associated in enterprises of plunder. Thus is every bad passion of his nature fostered and augmented systematically, every good one repressed and stifled. At

length he is old enough to go alone. And his first *voluntary* act is a crime. It may be that he only commits larceny, and the law is accordingly content at first to visit him with a moderate punishment. Or it may be that he has robbed a house, and, being surprised therein, committed murder in a fruitless attempt to escape. The law then takes his life. But has this wretched being any real choice of action, so reared, so taught? The vindicator of the law's justice will say,—We would have mercy on such cases were it not impossible to distinguish them, and allow such circumstances to weigh were it not beyond the scope of human penetration to analyse and estimate them rightly. True! it is impossible, and this may make your injustice less culpable, but it does not make you less unjust.

Take again another case. The child of drunken parents is, from the earliest childhood, dosed with strong liquors in large quantity. By this treatment the powers of the stomach are destroyed, as is the usual consequence. The wretched subject finds himself, when he has scarcely attained the age of manhood, a prey to the most intolerable sensations, except when under the influence of alcohol. To escape from such he constantly makes use of it, and the habit grows fixed and irresistible. His is unfortunately one of the not uncommon cases, where the man, tolerably reasonable and humane whilst sober, becomes when intoxicated full of violence and cruelty. In one of his paroxysms of drunkenness he kills his wife or child. To his plea that he did not know or could not help what he has done, the law answers, "Voluntary drunkenness is no excuse for crime;" and for this crime he is executed. Was he really a responsible being if M'Naughton was not so!

If then there be some relative injustice in the present administration of our criminal law, ought it not and could it not be corrected? The remedy clearly is not in the treating each particular crime differently according to all the circumstances connected with it and its author. Nothing short of divine intuition could enable an earthly tribunal to do this with any approach towards justice. There are but two methods of correction; the first imperfect, namely, to punish all offenders against the same law in the same way in every case where there is not a *proved certainty* of extenuatory or exculpatory

circumstances; the second perfect, namely, to spare them all alike.

The former course would have, as we believe, the one great merit of preventing crime to a greater extent than any other. Of all the qualities of punishment experience teaches its certainty to be the most effective. Were all homicides punished with death, unless it were known and proved of them that they were not wilfully committed, we cannot doubt that homicide would be diminished as far as human laws are able to diminish it, whatever other bad results might follow.

The latter course has, as we believe, every merit except this single one of prevention. Notwithstanding differences of theory we would fain think that the great mass of mankind, if once convinced of its practicability, would willingly subscribe to the humane and lovely doctrine, which objects to inflicting even on the greatest of criminals one atom of suffering or pain, not conducive to his own amendment, his temporal and eternal good. But is not such an alteration of the law impracticable in the present condition of this country? Would not crime multiply under it to an extent destructive of the well-being and happiness of society? The answer, we fear, must be in the affirmative. It is quite possible to conceive the existence of a commonwealth, where the universality of good education, and the general physical prosperity of the humbler classes, might so enlighten the minds and moderate the bad propensities of men, that even the temptation to atrocious crimes should become rare, and the commission of them almost unknown; where fear should cease to be the strongest of restraining motives; where all punishments therefore but the prison might be safely abolished, and the prison itself become but a stricter and less pleasant school. But for England, we fear, that time is far off yet.

J. S. S.

ART. VIII.—THE ECCLESIASTICAL COURTS BILL AND DOCTORS' COMMONS.

The Study of the Civil and Canon Law, considered in its Relation to the State, the Church, and the Universities; and its connection with the College of Advocates. By Robert Phillimore, Barrister, of the Middle Temple, Advocate in Doctors' Commons, and late Student of Christ Church.—pp. 71. 1843.

Dr. Robert Phillimore is a clever man, and a ready writer, but it is a matter of astonishment to us how he or his friends ever thought of setting up this pamphlet as an answer to the opponents of the Ecclesiastical Courts Bill. It does not answer a single paragraph in the petition of the Incorporated Law Society, which hardly contains a paragraph that is not pregnant with argument.

At present the main controversy stands thus. It is agreed on all hands that the jurisdiction over wills of personalty should be taken from the provincial courts, but the framers of the Bill wish to establish a new Ecclesiastical Court, to be called the Court of Arches, for the exclusive benefit of Doctors and Proctors, whilst their opponents contend that the whole testamentary business of the kingdom will be best transacted by the ordinary courts.

The petitioners state—

"That it has of late been an important object of the legislature to assimilate in many particulars, the law respecting real and personal estate, and much has been done in furtherance of this object; and that the leading intention of the Ecclesiastical Commissioners was to carry out this object much further.

"That out of the circumstances of remote times, the remarkable anomaly has arisen, that a will of personal estate requires probate to give it validity, whilst one of real estate requires no probate, and that the validity of a will of personalty is adjudicated on in the Ecclesiastical Courts, and that of realty in the Queen's Courts, the former having an ultimate appeal to the Privy Council, and the latter to the House of Lords; and thus it is possible that a will relating to real and personal estate, though in itself one undivided instrument, may be established by one class of Courts as to one portion of the property devised, and annulled by the other; and that such conflict is rendered more probable by the different rules

respectively prevailing in such Courts as to proof of execution and testacy.

"That though in practice such conflicting decisions are of rare occurrence, yet that it is not so much the conflict of decision as the deviousness and duplication of procedure, that is injurious to the community.

"That it is by no means uncommon to find the same will contested at the same time, both in the Ecclesiastical Courts and the Queen's Courts, on one and the same devise of real and personal estate; and that the known variation between the common law and civil law rules and views on this subject, is a great inducement to such contests. That as a matter of daily occurrence, it becomes important to the security of titles, and to the execution of trusts, where there is no adverse contention, as in the case of infancy, &c., that the validity of wills of real estate should be authenticated and established. That this is now done, in an indirect manner, by suits in Chancery, the effect of which, as regards real estate, is precisely similar to the probate in solemn form as to personalty, and thus different sets of proceedings in separate Courts are rendered necessary to establish one single and undivided instrument, and parties have to pay for the same thing being done twice over, when once was enough for all the ends of justice.

"That this anomaly is not only a reproach and discredit to English jurisprudence, but is a great source of needless litigation and double procedure, creating much uncertainty and expense."

The argument is clenched by two passages which occur in a subsequent part of the document:

"A will is nothing more than a deed of gift or settlement, to take effect on death; and whilst the duty of deciding on the validity of all other deeds and instruments whatever (numerous and diverse as they are in their character) is entrusted to the Queen's Courts, it would appear inconvenient and irrational to entrust the validity of deeds taking effect on death to a separate Court, with a special, distinct, and exclusive body of practitioners, maintained almost solely for that very arbitrary purpose.

"The bill proposes an object not only contravening these views, but even still more objectionable, namely, to maintain an exclusive Court to decide on the validity not even of one class of instruments, *but merely of one arbitrary aspect or section of an instrument, indivisible in its nature, leaving the trial of the residuum of such instrument to the great tribunals of the country.*"

The machinery of the Ecclesiastical Courts, as at present

constituted, is utterly inadequate to the satisfactory administration of assets, nor indeed could any Court, be its machinery what it might, compel accounts, marshal debts, distribute legacies, and do equal justice to the respective claimants of an estate, if its jurisdiction were confined to personalty? The dilemma, therefore, is certainly not overstated by the petitioners:

"If it be intended by the clauses of the bill and by amended rules and machinery of the Courts to extend the operation of these parts of their jurisdiction, it is obvious that conflicting decisions must repeatedly arise from the jurisdiction concurrently exercised in these matters by the Court of Chancery; and it will often happen, from the exclusive and anomalous character of the intended new Court, and from its separateness from the others of the Queen's Courts, that counsel and solicitors in advising their clients will do so in ignorance of the decisions of a Court in which they do not and cannot practise, and which proceeds on principles unknown to them; and that, in like manner, the practitioners in the new Court will act in ignorance of the decisions in the Queen's Courts.

"If, on the contrary, the jurisdiction as to legacies and accounts be not extended by the suggested changes, then the legislature would be establishing a Court of imperfect power and limited utility."

We must trouble our readers with one more extract.

"The Court of Chancery, with the aid of the Queen's other Courts, would, according to all the constitutional and judicial arrangements of the country, be the proper tribunal to decide all matters relating to the validity of wills; all questions of construction, legacy, and account, are already the special and appropriate business of that Court, and that therefore any new Court (if a new Court be required) ought to form a part of, or be in connection with, the Court of Chancery, as is now done in other countries which have adopted our jurisprudence, and particularly in the British colonies; such arrangements, of course, being carried out, with such peculiarities, in reference to the business, both of wills and marriages, as might be requisite.

It seems generally admitted that the testamentary business must be assimilated. The only real question is, whether wills of personal property shall be transferred to the ordinary courts, or wills of realty, with suits for legacies, accounts, &c. to the ecclesiastical. Can any one hesitate a single moment between these alternatives?

Now what says Dr. Robert Phillimore, the chosen champion of Doctors' Commons, to these arguments? for arguments we must take the liberty of calling them, until we have heard something approximating to a reply. Why he gives us an elaborate history of the growth and establishment of the civil law in these realms, proves unanswerably (though, we believe, unconsciously) that the study has stood constantly in need of some adventitious aid or other, asserts that it cannot be continued if the Ecclesiastical Courts are thrown open or deprived of their business, and proudly maintains that the glory of England will have departed for ever, when Doctors' Commons shall no longer exist as a sort of nursery or forcing-house for advocates capable of arguing admiralty cases in the contingency of a war. What will it avail us to have another Nelson to make prizes, unless we are likewise prepared with another Stowell to adjudicate on them?

This is literally the whole sum and substance of Dr. R. Phillimore's argument, weakened not strengthened by most of the incidental topics and illustrations that occur in it.

Now, we have not the least objection to concede to him, that it would be an evil were the study of the civil law entirely abandoned, and an ancient, learned and highly respectable branch of our common profession, inconsiderately suppressed. If he will do us the honour of turning to our second volume, he will find the best part of the task he proposed to himself in his pamphlet completed to his hands;[1] and the biographical tribute to Lord Stowell in our sixteenth will make it difficult to go beyond us in exalting the services rendered by that great civilian not merely to his own country but to mankind. Indeed the completeness of the fabric which he raised might alone serve to relieve Dr. Robert Phillimore from the worst of his apprehensions, touching the mischiefs that are to ensue from the ignorance or incapacity of Lord Stowell's successors. The foundations being laid, and the principles fixed, we incline to think that Lord Lyndhurst or Mr. Baron Parke (and it is no great compliment to either to say so) would give as good a judgment on the right of search as Mr. Justice Story could desire, and we should not very deeply commiserate the naval

[1] See 2 L. M. 481, an article of forty pages on the Study of the Civil Law.

officer or ship-owner who was compelled to put up with Sir William Follett or Mr. Pemberton as an advocate.

Dr. Robert Phillimore altogether lays out of the account the school for foreign, colonial and international law offered by the supreme Courts of Appeal, particularly the Judicial Committee of the Privy Council; and probably does not know that incomparably the best work on these branches of jurisprudence is the production of Mr. Burge. This learned and enlightened jurist is a member of the common law bar. So is Mr. Rogers, the author of the best modern compendium of Ecclesiastical Law. So was our lost friend and contributor, Edmund Plunkett Burke, the writer of the article on the civil law before-mentioned, and author of "An Historical Essay on the Laws and the Government of Rome: designed as an Introduction to the Study of the Civil Law." The first edition was published anonymously, and gave rise to a good deal of speculation at Trinity Hall and Doctors' Commons, because, as a distinguished advocate remarked, they felt that none of them were equal to it.

An extremely able essay on the Law of Nations has just appeared in the Edinburgh Review. Wonderful to say, it is attributed not to a member of the College of Advocates but a Master in Chancery. According to him, the Law of Nations now in force can have little connection with the Roman law; and what is called *Droit International Privé* has none at all. M. Fœlix, the author of the last and best work on the subject, says, "Chez les Romains, nous ne trouvons aucune trace de ce qu'on appelle aujourd'hui *Droit International.*"

Writing to exalt the study of the civil law, our late contributor remarked:

"We shall, indeed, take an early opportunity of showing that, notwithstanding the popular odium of which we have been endeavouring to point out some of the leading causes, the enactments of this very civil law, so much dreaded and so much vilified, have in numerous instances been adopted by our legislature, and that in a still greater variety of cases its principles have been openly sanctioned by our courts of justice. What we chiefly regret as the consequence of the illiberal prejudice to which we have already so often adverted, is the unwarrantable (and but for this prejudice we might

say unaccountable) neglect of the study of the civil law, which has long prevailed in this country.

"In the cultivation of almost every other department of learning, England can bear a comparison with any nation in the world. In a science which elsewhere, as Gibbon truly observes, has exhausted so many learned lives, and clothed the walls of such spacious libraries, she stands confessedly inferior. What works can our literature produce to match with the writings of the many illustrious civilians who have done honour to France and Germany? What names can it place in competition with those of Cujas and Pothier, of Heineccius, and Huber, and Bach, or, to speak of our times, of Hugo and Savigny? Certainly not one. Putting out of the question the masterly forty-fourth chapter of Gibbon, we believe that, with the exception of Selden and of Dr. Duck, the works of the few English civilians who are worthy of the appellation are almost entirely unknown except in their own country." (2 L. M. 518.)

Even these few, with hardly an exception, studied, lectured and wrote in the universities. Doctors' Commons can hardly lay claim to Lord Stowell, whom Dr. Robert Phillimore judiciously places in the very front of the battle. "He had not, in the first years of his college life, formed any definite intention of cultivating the civil law as a profession; but his historical inquiries had rendered him familiar with its study, and the advantages which *the then forlorn state* of Doctors' Commons presented to a young man of intelligence and enterprize were too great to be resisted by the attractions of a college life."[1] He was thirty-four when he became a member of the college.

We regret we cannot find room for Dr. R. Phillimore's spirited sketch of Lord Stowell's judicial character. We cordially agree with all he says on this subject, and simply dissent from the corollary:

"At present, by the rules of our charter, a considerable period must elapse between the time when the undergraduateship at the university ceases, and the practice of an advocate begins—a longer period than is requisite for practice at the common law bar. Very great advantage frequently has, and I think always ought to flow from this salutary regulation. Let any one consider the career of our two most eminent jurists, Sir Leoline Jenkins and Lord Stowell."

* * * * *

[1] 16 L. M. 31.

"Can any one peruse with attention all these monuments of a master-mind (Lord Stowell's judgments) and doubt that they were the acquisitions of long and tranquil study, matured by patient thought and calm reflection, such as could scarcely have been accumulated under the pressure of early and extensive practice, and especially of practice in a law whose peculiar and technical character must in some respects tend to disqualify the mind for such researches?"

If this means anything, it means that English barristers, as a class, do not study their profession on liberal and comprehensive principles, because they are hurried into practice too soon. Yet Lord Kenyon spoke of the late Mr. Justice Holroyd as a rising young man at forty-seven! Then, as to the peculiar and technical character of our law, does Dr. Robert Phillimore suppose that it is all comprised in Tidd and Archbold? or has he yet to learn that a barrister in extensive practice is constantly required to argue questions involving the leading principles of general law, and connected with every conceivable branch of knowledge? The argument is, that the Doctors must perish unless their practice in matrimonial and testamentary matters is preserved to them. This practice, therefore, will be their chief, if not sole employment; and we are required to take for granted that, by way of preparation for it, they will make a point of becoming proficients in international law, so as to be ready to maintain the national honour against the best American or continental jurists in the remote contingency of a war. Nine out of ten will do nothing of the sort; the tenth may, but he is not more likely to take a comprehensive range than any given member of the common law or equity bar.

"It is no answer to this observation, to say that there have been barristers who were well versed in the learning of our profession. Such undoubtedly were the learned Selden, Lord Mansfield, Sir W. Grant, Sir W. Jones, the late Sir James Mackintosh. Such is, I believe, Lord Brougham. The question, it will be recollected, is as to the *general* tendency of the exclusive study and early practice of our municipal law."

We might just as well say, "the question is as to the general tendency of the exclusive study and early practice of our ecclesiastical law." The answer is that early practice does not

fall to the lot of one in fifty, and that the study of our municipal law is not necessarily more exclusive, nor more harassing or cramping to the intellect, than that of the ecclesiastical law. Were any further answer needed, it would be furnished by such a list of common law and equity barristers, versed in civil law or imbued with the best spirit of general jurisprudence. The tree is known by its fruits; and when the names of Lord Hardwicke, Blackstone, Charles Butler, Hargrave, Horner, Romilly and a host of others are added, as they ought to be, we think Dr. Robert Phillimore will find it no easy matter to maintain, that general practitioners are *ex vi termini* incapacitated for moving in the more exalted walks which he is anxious to secure for his brethren. Indeed, unless we make over to him the fee simple of Lord Stowell's fame unconditionally, he will hardly succeed in showing that his college has contributed its fair quota to the beadroll of forensic celebrities.

We have said that most of Dr. R. Phillimore's incidental topics weaken his argument. To prove this, we will mention a few of them.

He adduces several cases to prove that "the principles of the civil law are administered in our courts." He might go further, and assert that our system of commercial law, framed by Lord Mansfield, is mainly founded on them; that they have gradually crept into every European code; and that the driest practitioner is constantly talking Justinian, as Monsieur Jourdain talked prose, without knowing it. Does this prove that the sacred fire of the Institutes and Pandects must be extinguished, unless a peculiar college is maintained to foster it?

Again, he alludes with just pride to the connection of his college with the Church and the Universities. Is this a source of weakness, or a topic *ad misericordiam?*

As to the connection with the Church, both supporters and opponents of the bill propose confirming it, by leaving the purely spiritual jurisdiction of the ecclesiastical courts unimpaired. But perhaps this connection may prove a little too close; for if the whole testamentary business of the kingdom, with its incidents, were transferred to our ecclesiastical

Courts, ought all practitioners, not members of the established Church, to be excluded from them?

With regard to the Universities, the first thing to be done seems to be, to compel Sir Robert Inglis to undergo an examination in the civil law; for Dr. R. Phillimore lays great stress on the fact, that the charters of 1604, which empowered the Universities to choose representatives, expressly admonish them to select such as are "skilful in the Imperial Laws."

He urges the necessity of a division of labour. Is the division between the equity and common law bar, or between special pleaders and conveyancers, incomplete, because there is no line of demarcation beyond what has been traced by convenience? Here, as well as in his allusion to the early practice of the bar, he mistakes form for substance, and words for things. Were a sudden increase of business to flow into the Admiralty Court, all the barristers who had studied general jurisprudence would repair to it, and a better bar would rapidly be formed in this manner than could be supplied from the entire College of Advocates.

"The Court of Common Pleas has been deliberately closed by the decision of all the judges, after an attempt to throw it open. Why is the charter of the Advocates at Doctors' Commons to be violated?"

The Court of Common Pleas was closed because the warrant for opening it turned out illegal, and no one doubts that it must and will be re-opened before long. Who talks of violating the charter of the College of Advocates? He might just as well accuse the Great Western Railway Company of burglariously entering the Castle Inn at Marlborough, because they have indirectly been the ruin of that old and excellent inn, which has recently been converted into a school. It is possible that the College of Advocates may share the same fate; for though vested interests should always be respected, and though no change, injurious to any portion of the community, should be adopted without a clear and sure balance of advantage to the public,—it is a little too much to expect the nation to stand still till every individual class or order, however small, finds it both convenient and profitable to move on with the rest.

There is not the most distant chance of our being ever in want of competent jurists for practical purposes; but were the contrary the case, can it be seriously contended for a moment that we are to submit to have all the testamentary business of the kingdom badly or expensively transacted, in order to keep up a breed of advocates to argue prize questions at some remote and contingent period.

The topic of vested interests comes with a bad grace from the supporters of this bill. "It seems an unjust and harsh measure," say the petitioners, "to oblige (as in effect is proposed) the proctors now resident in country dioceses, to remove with their families to London, to take the chance of establishing a new business, and to seek for new houses and new connections." But Dr. R. Phillimore has no tears for them. He is like the man in the old story, who excused himself for not crying at a charity sermon, because it was not his parish.

H.

DIGEST OF CASES.

COMMON LAW.

[Comprising 1 Adolphus & Ellis (New Series), Parts 4 and 5; 2 Gale & Davison, Part 4; 4 Scott's New Reports, Part 4; 10 Meeson & Welsby, Parts 2 and 3; 2 Dowling's Practice Cases (New Series), Parts 1 and 2; and a selection from 1 Carrington and Marshman, Part 3;—all cases included in former digests being omitted.]

ACTION ON THE CASE.

(*For weakening supports of Plaintiff's house—Custom of London to erect hoarding—Arbitration.*) At the trial of a cause the verdict was taken for the plaintiff, "subject to the award, order, arbitrament, final end and determination," of a legal arbitrator, who was authorised to award the verdict to be entered for the plaintiff or defendant, or a nonsuit to be entered, as he should think fit, and who was directed, "at the request of either party to state any point of law upon the face of his award for the opinion of the Court:" Held, that it was not necessary for him to decide as to the amount of damages to be finally recovered, and to direct how judgment should be entered up; but that having disposed of all the issues separately, and having assessed damages separately in respect of each subject-matter of complaint stated in the declaration, and having at the request of both parties raised questions for the opinion of the Court, his award was good.

The declaration alleged that the plaintiff was possessed of a house, and that the defendant was also possessed of a house next adjoining to that of the plaintiff, and that the defendant, contriving to injure the plaintiff, by his agents and workmen, behaved and conducted himself so carelessly, negligently, and improperly in pulling down the said house of the defendant, that by and through the carelessness, &c. of the defendant, &c., and in neglecting to use due and proper precaution in that behalf, divers large quantities of bricks, tiles, &c. fell from the said house of the defendant into and upon divers parts of the said house of the plaintiff, and upon and through divers windows and skylights of the plaintiff, and thereby, &c.: Held, that the declaration disclosed a sufficient cause of action, for that it complained not of a mere omission on the part of the defendant, but of his doing certain acts, by the negligent performance of which the plaintiff was injured.

The plaintiff in his declaration complained, that he being possessed of a certain dwelling-house, and the defendant also being possessed of a certain other dwelling-house, next adjoining that of the plaintiff, the defendant proceeded to pull down

his said house for the purpose of rebuilding another house on the site thereof; and that the defendant, contriving, &c. by his workmen, &c. behaved and conducted himself so carelessly, negligently and improperly in and about digging and clearing the ground for the foundation of the said house, so built on the site of his said first-mentioned house, and in and about underpinning the party wall between that house and the said house of the plaintiff, &c. that by and through the carelessness, &c. of the defendant and his agents, the said party wall, and all the walls, floors, beams, &c. of the said house of the plaintiff were greatly sunk, cracked, weakened and injured, &c.: Held, that the declaration disclosed a good cause of action, for that the defendant had no right to underpin the party wall either partially or wholly, unless that could be done without injury to the plaintiff's house, even although it might be doubtful whether the interests of the parties were several, or whether they stood in the relation of tenants in common.

The declaration stated that the plaintiff and defendant were respectively possessed of houses next adjoining to each other in a street in the city of London, and the defendant was purposing to pull down his said house, and to build another that on the site thereof; and that preparatory thereto, he erected and placed a certain hoarding in front of his said house, in such manner that the said hoarding inclosed part of a public footway running in front of the said houses of the plaintiff and defendant, and that the defendant afterwards pulled down his said house and erected another on the site thereof; yet the defendant, contriving, &c. wrongfully, injuriously, and without any reasonable or probable cause, delayed the pulling down and rebuilding of the said house for an unreasonable long time, and on that account wrongfully, &c. kept and continued the said hoarding so erected as aforesaid for a long and unreasonable time, to wit, &c. whereby, &c. The defendant pleaded, as to so much of the declaration as related to the keeping and continuing the said hoarding so erected, that from time whereof, &c. there had been and then was within the city of London a certain ancient and laudable custom, &c. that if any person had occasion to erect or pull down any building near to any public way within the said city, and had occasion for that purpose to erect any hoarding in such manner as thereby to obstruct or inclose any part of any public way, and had applied to the Lord Mayor of the said city for his license to erect, place and continue the same, such Lord Mayor had full power and authority to authorize, license and permit, &c. such person to erect such hoarding for such purpose as aforesaid, of such dimensions, and in such manner, and for such time as he thought proper for such purpose; and the person so applying for and obtaining such license hath been used and accustomed of right to erect such hoarding, &c., except so far as such custom hath been affected by 57 Geo. 3, c. 29 (the Paving Act.) The plea then went on to justify under the custom, alleging the license of the Lord Mayor and the surveyor of pavements to have been duly obtained. Replication, protesting the custom, and alleging that the defendant of his own wrong, and without the residue of the cause in the plea mentioned, committed the grievances. The issue having been found for the defendant, upon a motion to enter judgment non obstante veredicto, held, that the custom alleged was a reasonable custom: Held, also, that the plea was supported by the production of licenses from the Lord Mayor for the time being, (who gave liberty for the erection of a hoard sixty-two feet in length, and projecting four feet from the premises about to be pulled down, to continue four weeks, provided the license of the surveyor of pavements should also be obtained) and of the surveyor of the pavements, "to erect and continue four hoards in manner and from the time above-mentioned," and that

the hoard which was to be erected was sufficiently identified in the latter to be the same referred to in the former license.—*Bradbee* v. *Governors of Christ's Hospital*, 2 D. P. C. (N. S.) 164.

AFFIDAVIT.

1. (*Description of deponent.*) Where a deponent describes himself as "agent of the above-named plaintiff in this cause," it is a sufficient compliance with the rule of H. T. 2 W. 4, requiring the addition of the deponent to be inserted in the affidavit.—*Luxford* v. *Groombridge*, 2 D. P. C. (N. S.) 332.

2. An affidavit commencing "A. B., of, &c., maketh and saith," (the word "oath" being omitted) will not be received by the Court, even though it purports by the jurat to have been duly sworn. (3 D. P. C. 261.)—*Doe* d. *Britton* v. *Clark*, 2 D. P. C. (N. S.) 393.

And see PROHIBITION.

ANNUITY.

1. (*Action for money had and received by grantee of annuity, after annuity set aside.*) The grantee of an annuity which had been avoided for a defective memorial by the administratrix of the grantor, brought an action against the administratrix to recover the balance of the consideration money. The declaration, in assumpsit for money had and received to the use of the plaintiffs, alleged the money to have been had and received by the intestate. Held, issue being joined on a plea of non-assumpsit, that the consideration money did not become money had and received until the avoidance of the annuity by the administratrix, and that it was not money, therefore, had and received by the intestate at all, and that the declaration was not supported by the facts. (9 Bing. 748.)—*Churchill* v. *Bertrand*, 2 G. & D. 548.

2. (*Memorial.*) Covenant on an annuity deed alleged to have been made between the defendant of the one part and the plaintiff of the other part. Plea, that the annuity was granted for a pecuniary consideration paid by the plaintiff to A. K., and that no memorial thereof was inrolled in Chancery pursuant to the statute. Replication, setting forth a memorial inrolled in the manner directed by the act of parliament, but stating the parties to the deed as being the defendant and his wife, A. K., of the one part, and the plaintiff of the other part: Held, on special demurrer, that the memorial was sufficient, and the replication good.—*Papineau* v. *King*, 10 M. & W. 216; 2 D. P. C. (N. S.) 226.

ARBITRATION.

1. (*Award—Repugnancy.*) In debt for money had and received and on an account stated, the defendant pleaded nunquam indebitatus, payment, and set-off; the cause and all matters in difference were referred to an arbitrator, who directed a general verdict to be entered for the defendant. Semble, that there was no inconsistency in the award as regarded the pleas of nunquam indebitatus, payment, and set-off; but held, that the verdict being entered for the defendant on those pleas, the defendant could not be entitled to a verdict on the plea of set-off, all matters in difference being referred as well as the cause. (7 M. & W. 134; 9 D. P. C. 1052.)—*Malony* v. *Stockley*, 2 D. P. C. (N. S.) 122.

2. (*Rule under* 1 & 2 *Vict. c.* 110, *s.* 8—*Interest.*) Upon a rule calling on a defendant to show cause why he should not pay a sum of money awarded against him upon a reference of a cause to arbitration, the Court made the rule absolute, although the forms of service required under the old practice on motions for an attachment had not been pursued.

The arbitrator made his award on the 1st Sept. 1841, directing payment on the 25th Jan. 1842, of a certain sum, with interest: Held, that under this award, upon a rule under the 1 & 2 Vict. c. 110, s. 8, the plaintiff could recover no interest accruing after the 25th Jan.—*Doe* d. *Moody* v. *Squire*, 2 D. P. C. (N. S.) 327.

3. (*Award—Uncertainty—Excess of Authority.*) An action of trespass to houses and land of the plaintiff was referred to an arbitrator, who was "to settle at what price and on what terms the defendant should purchase the property." The arbitrator fixed a sum at which the defendant "should purchase the plaintiff's said property," and directed that the defendant, after the conveyance of the property, should be entitled to sue in the plaintiff's name in enforcing certain rights: Held, first, that the award was bad for uncertainty, the arbitrator not having specified "the property" to be purchased: secondly, that the arbitrator had exceeded his authority in empowering the defendant to sue in the plaintiff's name.—*Round* v. *Hatton*, 2 D. P. C. (N. S.) 446.

And see ACTION ON THE CASE.

ATTACHMENT.

(*Interrogatories.*) Where a defendant was in custody on an attachment for non-performance of an award, the prosecutor was ruled to exhibit interrogatories; he did so, and they were filed; but not ruling the defendant to appear before the examiners the Court discharged the defendant on bail. (4 T. R. 316.)—*Doe* d. *Clarke* v. *Stillwell*, 2 D. P. C. (N. S.) 18.

ATTORNEY.

1. (*Changing attorney—Rights of original attorney.*) Upon a change of attorneys under a rule of Court, the new attorney undertook to hold the record and papers in the cause, subject to the lien of the former attorney: Held, that, the cause having been brought to a successful termination, the former attorney was entitled to call upon his successor to proceed with the taxation, issue execution, and pay him the amount of his lien out of the first proceeds, subject only to the costs necessarily incurred on such taxation.—*Newton* v. *Harland*, 4 Scott N. R. 769.

2. (*Liability of, for negligence in soliciting act of parliament.*) The plaintiffs, parliamentary agents, brought an action for work and labour in soliciting a bill in parliament, for better paving, lighting, and improving the city of Norwich and county of the same city. The defence was, that the work and labour was performed in so careless, negligent, ignorant, and insufficient a manner that the same became and was wholly useless and unbeneficial to the defendants. It appeared that the bill passed the House of Commons, but was thrown out by the Lords, the standing order committee having reported that "powers for the compulsory purchase of houses and lands were contained in the bill, and that no application had been made to the owners, lessees, and occupiers of such houses and lands, as was required by the standing orders." The Lord Chief Justice, in his summing up, referred to the clause of the bill which was supposed to take such compulsory powers, and to the standing orders, and intimated a strong opinion that inasmuch as no specific lands were intended to be taken, nor any compulsory power exercised, the standing orders did not apply to the case; but that at all events the matter was much too doubtful to warrant the jury in finding that the plaintiffs had been guilty of gross negligence. The jury found for the plaintiffs; the Court refused to disturb their verdict, holding the direction of the Lord Chief Justice to be unexceptionable.—*Bulmer* v. *Gilman*, 4 Scott, N. R. 781.

3. (*Assignment of articled clerk.*) Where an articled clerk has served a portion of his time with a particular master, who has gone abroad, and who cannot execute an assignment of the articles, the Court will allow him to serve the remainder of his term with another master without an assignment of the articles.—*Ex parte Hancock*, 2 D. P. C. (N. S.) 54.

4. (*Signature of bill.*) A bill was signed by one of two attornies in partnership, thus:—"For self and Robert Owen, J. H. Dixon:" Held a sufficient signature within the 2 Geo. 2, c. 23, s. 23. (1 C. & J. 542.)—*Owen* v. *Scales*, 2 D. P. C. (N. S.) 304.

5. (*Examination—Admission.*) Where an articled clerk had been examined and obtained his certificate of fitness in Trinity term, 1841, and took no further steps to procure his admission as an attorney, and did not within the next term apply for an extension of the time during which his certificate should run, the Court, in M. T. 1842, held that the operation of the certificate had ceased, and refused to make an order for its revival.—*Ex parte Bromley*, 2 D. P. C. (N. S.) 388.

6. (*Attorney and client—Delivery up of papers.*) The Court refused a rule calling on an attorney to deliver up papers where it appeared that they had come into his possession as executor of his father, who had been the attorney of the applicant, but where the applicant did not adopt him as his professional agent.—*Ex parte Nicholls*, 2 D. P. C. (N. S.) 423.

And see PARTNERSHIP.

BANKRUPTCY.

1. (*Certificate, when a bar to action by surety.*) Assumpsit for money paid. Plea, the defendant's certificate under a fiat in bankruptcy, that the money was paid for a debt of defendant, due before his bankruptcy, for which plaintiff was surety, and that plaintiff paid the money without any request from the defendant, except the request supposed to arise by law from the premises. Replication: that before the payment the defendant had obtained his certificate, and that a final dividend had been made of his estate, and that there was not any debt in respect of the payment of which plaintiff could have proved or for which he could have received any dividend. On special demurrer to the replication, held, that the certificate was a discharge from the claim, as the principal creditor might have proved, and if he had, the plaintiff would have been entitled to the benefit of that proof either in reduction of his liability to the creditor, if the creditor received the dividends, or by receiving the dividends himself, if he paid the whole debt to the creditor, or the plaintiff might have paid the debt at once to the creditor, and have himself proved before any dividend was declared; or if the creditor would not take the debt, the plaintiff might have compelled him to prove for the plaintiff's benefit. (10 Ves. 409.)—*Jackson* v. *Magee*, 2 G. & D. 402.

2. (*Order to substitute new petitioning creditor's debt, requisites of.*) By an order of the Court of Review, under 6 Geo. 4, c. 16, s. 18, for substituting a new debt in lieu of the petitioning creditor's debt, upon which a fiat issued, reciting that certain persons had preferred a petition to the Court, setting forth, among other matters, "that a fiat in bankruptcy, bearing date the 9th June, 1837, was, on the petition of T. R., duly awarded and issued against the bankrupts, under which they were duly found and declared bankrupts, and that the petitioners had duly proved a debt under the fiat, and were creditors of the bankrupts for the sum of 150*l.*, being the balance of an account for money lent and advanced to the bankrupts by the petitioners on the 13th May, 1837, and that the same debt was in-

curred by the bankrupts not anterior to the debt of the said petitioning creditor under the fiat, and praying that the Court would be pleased to order and allow the debt of the said petitioners to be substituted for the debt of T. R. in the proceedings under the fiat, and that it might be proceeded in and deemed valid, &c." It was declared that the debt of T. R., upon which the adjudication of the bankruptcy was made, was an insufficient debt, and then the order proceeded—" and it appearing to the Court that the debt of the petitioners, proved by them under the said fiat, or so much thereof as is sufficient to support such fiat, was incurred not anterior to the said debt of the said T. R., and is an existing and sufficient debt to support the said fiat, the Court doth order," &c.: Held, that the order was invalid, inasmuch as it contained no adjudication that the debt of the petitioners had been proved under the fiat at the time they presented their petition as required by the statute.

The order was originally issued before the commencement of the action, but after two trials had taken place, and just on the eve of a third, the assignees procured it to be amended by more fully reciting the petition upon which it proceeded, the defendant having no notice of the application for such amendment: Held, that the order as amended must be taken to speak from its original date; and that the want of notice to the defendant was no ground of objection.—*Brancker* v. *Molyneux*, 4 Scott, N. R. 753.

3. (*Payment by bankrupt, when protected—Fraudulent preference.*) A. and B., brothers, being partners in trade, and B. being largely indebted to the partnership, B. borrowed 500*l.* from a loan company, which was secured by a bond of C., (the uncle of A. and B.) and two other persons, and by a policy of assurance on B.'s life. Of this sum B. paid 400*l.* into the partnership funds. B. afterwards executed a warrant of attorney to C. to indemnify him against the consequences of the bond. B. having made default in payment of the premiums on the policy of assurance, the loan company called on C. for payment under this bond, whereupon C. entered up judgment on the warrant of attorney against B. and issued a fi. fa. thereon, which was levied on the partnership effects on the 5th August, 1840. At that time A. and B. were in a state of hopeless insolvency. On the 7th August, another execution at the suit of another creditor was issued against B. and levied on the partnership effects. On the 8th August A., in the name of the partnership, indorsed and delivered to C. on account of his claim against B., bills of exchange drawn by A. and B. for 80*l.* which were paid at maturity; and on the 10th A. paid to C. on the same account, out of the monies of the firm, a further sum of 80*l.* in cash. On the 11th a docket was struck against A. and B., and on the 12th a fiat issued against them, grounded on an act of bankruptcy committed on the 5th August, and on the 13th they were duly adjudged bankrupts.

Held, that the assignees were entitled to recover from C. the amount of the payments so made to him on the 8th and 10th of August, and that they were not protected by the stat. 2 & 3 Vict. c. 29, not being payments really and bonâ fide made, within the meaning of that statute, even though C. were assumed to have received them without notice of the bankruptcy.

Semble, (per Alderson B.) that a mere *payment* by a bankrupt to a creditor after the act of bankruptcy is not a contract, dealing, or transaction within the meaning of the 2 & 3 Vict. c. 29, but that the case of such a payment is still governed by the 6 Geo. 4, c. 16, s. 81.

Quære, whether these were payments made by way of fraudulent preference within that section.—*Turquand* v. *Vanderplank*, 10 M. & W. 180.

4. (*Act of bankruptcy—Waiver by assignees of tort—Particulars of demand.*) Indebitatus assumpsit by the assignees of a bankrupt. The first four counts were for goods sold, money paid and had and received, and on an account stated, laying the promises to the bankrupt; the fifth, sixth, and seventh counts were for goods sold, money had and received, and on an account stated, laying the promises to the assignees. Pleas, first, except as to 320*l.* parcel, &c., and except as to 140*l.* parcel of the sums in the first, second, third, and fourth counts mentioned, non assumpsit. Secondly, as to the said sum of 140*l.*, parcel of the monies in the first, second, third, and fourth counts mentioned, a plea of mutual credit, which had been demurred to, and on argument judgment given for the defendant. Thirdly, as to the 320*l.* payment of that sum into Court, which the plaintiffs took out and joined issue on the plea of non assumpsit. The following were the particulars of demand, delivered prior to the pleas. "This action is brought to recover the sum of 140*l.*, the value of certain yarn; also the sum of 316*l.*, the proceeds of a bill of exchange, drawn by J. M. and indorsed by the bankrupt to the defendant; also 4*l.*, the proceeds of a cheque; and 80*l.* in cash; the said yarn, bill of exchange, cheque and cash having being received by the defendants from or by the authority of the bankrupt, about the month of September or October, 1839. The particular date is known to the defendants." At the trial, the cause proceeded for the recovery of the sum of 140*l.* only, and no evidence was adduced as to the 80*l.* cash. It was objected that the plaintiffs were not entitled to go into evidence as to the 140*l.*, as that sum was already satisfied by the judgment upon the demurrer, and that that sum must be struck out of the particulars of demand; but the learned judge received the evidence, giving the defendant leave to move to enter a nonsuit. A rule having been accordingly granted on that ground: Held, that the plaintiff was entitled to give evidence of goods sold to the amount of 140*l.*. upon the other counts of the declaration, to which the plea was not pleaded, and might apply the particulars to those counts.

Where a debtor, upon applications made to him by creditors for payment of their debts, made appointments with them to meet him at specified times and places with reference to a settlement of their demands, but failed to keep such appointments: Held, that the failure to keep the appointments constituted acts of bankruptcy, although the places at which the appointments were made were not his usual places of business.

It appeared at the trial, that after the bankruptcy, eighty-five bundles of yarn, of the value of 114*l.*, had been delivered by the bankrupt to the defendants, as they alleged, to meet an accommodation bill which they were about to give the bankrupt. The goods were accompanied by an invoice, which stated them to be bought by the defendants of the bankrupt: Held, under these circumstances, that the assignees might waive the tort, and bring assumpsit for goods sold and delivered.—*Russell* v. *Bell*, 10 M. & W. 340.

5. (*Procuring goods to be taken in execution—Proof of title of assignees in trover.*) The suffering judgment to go by default against a person is not a procuring his goods to be taken in execution, under the 6 Geo. 4, c. 16, s. 3, so as to be an act of bankruptcy, though his goods be afterwards taken in an execution sued out on that judgment.

The procuring a man's goods to be taken in execution has no effect as an act of bankruptcy till the goods are actually taken.

In trover by assignees of a bankrupt, if the defendant plead that the plaintiffs are not assignees, the plaintiffs may on that issue give evidence of any act of bankruptcy committed before the date of the fiat, though after the transaction charged as the conversion.—*Gibson* v. *King*, 1 C. & M. 458.

BILLS AND NOTES.

1. (*Re-issuing bill without fresh stamp—Pleading.*) To a declaration on a bill of exchange by the indorsee against the acceptor, the defendant pleaded that the bill was accepted for the accommodation of the drawer, without any consideration for the acceptance; that after the acceptance, it was negociated by the drawer for his own use, and paid by him when it became due, and that afterwards it was re-issued by him without a fresh stamp, and indorsed to the plaintiff with notice of the premises: Held, 1st, That the plea was not bad for duplicity, but contained one defence only, viz. the re-issuing the bill under the circumstances without a fresh stamp; 2ndly, That the re-issuing the bill without a fresh stamp was a good defence, inasmuch as being an accommodation bill, which had been satisfied by the drawer, who was the party ultimately liable upon it, it was no longer a negociable instrument, and could not be put into circulation again without a fresh stamp, as required by 55 Geo. 3, c. 184, s. 19; and 3dly, That it was a defence that did not arise only on the evidence, but might well be pleaded, inasmuch as the 19th section of the same statute inflicts a penalty on re-issuing a bill of exchange after it has been paid, and a bill re-issued contrary to such prohibition becomes void.—*Lazarus* v. *Cowie*, 2 G. & D. 487.

2. (*General acceptance—Frivolous demurrer—Pleading.*) An acceptance in this form—"Payable at Messrs. C. & Co., Bankers, London," is a general acceptance since the stat. 1 & 2 Geo. 4, c. 78; it is therefore a frivolous demurrer to a declaration by indorsee against acceptor of such a bill, that it was not alleged to have been presented for payment at the bankers.

In an action by indorsee against acceptor of a bill of exchange, it is not necessary to allege the acceptor's notice of the indorsement, though such an allegation is introduced into the forms given by the rule of T. T. 1 W. 4, and a demurrer on the ground of the omission of such allegation is frivolous.—*Skelton* v. *Halstead*, 2 D. P. C. (N. S.) 69.

And see PARTNERSHIP; PLEADING, 1, 5, 10.

BOND.

(*By trustee on loan of trust monies to his co-trustee, validity of—Damages on forfeiture of.*) A testator devised his real and personal estate to D. and R., upon trust to sell, and to invest the sum of 10,000*l.*, arising therefrom, in the public funds or real securities, for the benefit of certain persons mentioned in the will. The money was not so invested, but with D.'s consent was received by R., and used by him in his private trade; and R. gave to D. a bond, conditioned to keep him harmless and indemnified against all actions, suits, proceedings, claims, demands, loss, costs, charges, damages, and expenses, on account of the said sum of 10,000*l.*, or by reason of R.'s being permitted to hold the same: Held, that this bond was valid in law.

The legatees having filed a bill in Chancery against the trustees and their representatives, claiming payment of the 10,000*l.* and interest, obtained a decree whereby it was declared that D. and R. were jointly and severally liable to pay

that sum: and the legatees carried in a claim against D.'s estate for that amount, but no money was received therefrom: Held, that the representatives of D. were entitled to recover from R., in an action on the bond, the whole amount of 10,000*l.* and interest, and that their claim was not limited to the amount of costs actually incurred and paid by them in the Chancery suit.—*Warwick* v. *Richardson*, 10 M. & W. 284.

BRIDGE. See COVENANT, 1.

BYE-LAW.

(*Of company of city of London, to provide dinner, when valid.*) A bye-law made by a prescriptive company of the city of London (under power with letters-patent to make bye-laws, and fine for breach of them), that on the day of election of the masters and wardens of the company, in which the freemen had no voice, two of the freemen should provide a dinner for all the members of the company, and pay out of their own pockets such expenses thereof as should be incurred beyond a certain sum allowed for that purpose, or be fined in default, is a bad bye-law. (1 Ld. Raym. 113; 5 Bing. 79.)—*Scriveners' Company* v. *Brooking*, 2 G. & D. 419.

CARRIER. See CONTRACT OF SALE, 2.

CERTIORARI.

An affidavit must be produced in support of an application for a certiorari to remove an inquisition before the coroner.—*Reg.* v. *Southampton Railway Co.*, 2 D. P. C. (N. S.) 53.

CHURCH-RATE.

(*Jurisdiction of ecclesiastical courts as to—Prohibition.*) A prohibition will go to the Ecclesiastical Court in a suit to enforce the payment of a sum under 10*l.* due upon a church-rate, where neither the validity thereof nor the liability of the party to pay it is disputed. (4 Ad. & E. 433.)

A declaration in prohibition sufficiently discloses that they are not disputed which alleges that the defendant appeared in the Ecclesiastical Court under protest against the jurisdiction, and afterwards protested against it, on the ground that the amount to be recovered was under 10*l.*, and that the validity had not been disputed by the plaintiff, as after such a proceeding in the Ecclesiastical Court, he would be unable to contest the jurisdiction of the justices by denying the validity of the rate, or his liability to pay it.—*Richards* v. *Dyke*, 2 G. & D. 493.

COGNOVIT.

(*Attestation.*) A cognovit was attested as follows: "Witnessed by me, W. P., as the attorney of the said W. B., attending at the execution hereof, at his request, and expressly named by him:" Held insufficient. (8 D. P. C. 113; 9 D. P. C. 808; 1 D. P. C. (N. S.) 643.)—*Hibbert* v. *Barton*, 2 D. P. C. (N. S.) 434.

COMMITMENT.

(*When bad for variance from conviction.*) On a complaint against a servant for absenting himself from his service, made under the 4 Geo. 4, c. 34, s. 3, the conviction adjudged that he should be imprisoned in the house of correction, there to remain and be held to hard labour for one month. The commitment required the keeper to receive him into custody, there to remain *and be corrected*, and held to hard labour for one month, (following the words of the 20

Geo. 2, c. 19, s. 2): Held, that the "correction" therein mentioned must be understood to mean something beyond the hard labour, and therefore that the commitment was bad, as varying in this respect from the conviction, and authorizing a punishment not warranted by the statute. (14 East, 696; 3 B. & C. 409; 1 C. M. & R. 602.)—*Wood* v. *Fenwick*, 10 M. & W. 195.

CONSTABLE.

(*Trespass against—Evidence in mitigation of damages.*) Trespass was brought against three defendants for an assault committed in Bristol. Two of the defendants were constables of Oxford, who had taken the plaintiff into custody in Bristol, on suspicion of his having stolen a horse belonging to the third defendant in Oxfordshire. The declaration alleged the trespasses to have been committed without reasonable or probable cause: Held, that under not guilty the constables might give the special matter in evidence in mitigation of damages, to show that they had acted bonâ fide.—*Rowcliffe* v. *Murray*, 1 C. & M. 513.

CONTRACT OF SALE.

1. (*Implied warranty—Contracts executed and executory.*) Assumpsit. The declaration stated that heretofore, to wit, on the 29th September, 1840, in consideration that plaintiff, at the request of defendant, had bought of defendant a certain horse at a certain price, to wit, 30*l.*, the defendant promised plaintiff that the horse was sound and free from vice: Held, in arrest of judgment, that the promise appeared to have been made in respect of a precedent executed consideration; that it must be taken to have been an express promise; that no such promise on such a consideration, though executed at request, could extend beyond the promise which the law would imply while the consideration was executory; that at the time of sale the only implied promise was to deliver the horse on request, and that after the sale, therefore, there was no consideration for the subsequent express promise of warranty. (Cro. Jac. 196; 5 M. & W. 241; 1 B. & Adol. 950; 11 Ad. & E. 438; 1 Man. & G. 166.)—*Roscorla* v. *Thomas*, 2 G. & D. 508.

2. (*Property, when it vests in consignee—Action against carrier.*) Goods exceeding 10*l.* in price were verbally ordered of plaintiff; no particular mode of carriage was specified, nor was there any evidence of any particular course of dealing between the plaintiff and vendee. The plaintiff afterwards forwarded the goods by the defendant, who was a common carrier; the goods were lost while in defendant's custody: Held, that the plaintiff was the proper party to bring an action for the loss of the goods, the property therein not having passed to the vendee. (1 M. & Rob. 223; 3 Campb. 528.)—*Coates* v. *Chaplin*, 2 G. & D. 552.

CONVICTION. See COMMITMENT.

COPYHOLD.

(*Inspection of Court Rolls.*) Where a devisee of a rent-charge on copyhold premises was desirous of completing his title, the Court granted a rule absolute in the first instance for the usual limited inspection of the rolls of the manor, although the applicant was not a copyholder. (7 D. P. C. 690.)—*Ex parte Barnes*, 2 D. P. C. (N. S.) 20.

CORPORATION.

Trespass lies against a corporation. (1 G. & D. 457; 16 East, 6.)—*Maund* v. *Monmouthshire and Staffordshire Canal Company*, 2 D. P. C. (N. S.) 113.

COSTS.

1. (*Security for.*) The Court will not interfere with the master's discretion as to the amount of security for costs to be given by a foreign plaintiff, unless a case of manifest and gross error be made out.—*French* v. *Maule*, 4 Scott, N. R. 719.

2. (*Same.*) Where a plaintiff has been compelled to give security for costs, on the ground that he was out of the jurisdiction; on an application to discharge the rule for that security, on the ground of the plaintiff's return to this country, with an intention permanently to reside here, it is sufficient for the plaintiff's attorney's clerk to make an affidavit to that effect.—*Thrasher* v. *Busk*, 2 D. P. C. (N. S.) 5.

3. (*Of witnesses in trespass.*) In an action of trespass for entering the close of the plaintiff, breaking the soil, digging and carrying away the minerals, the defendant pleaded that the plaintiff was not possessed of the minerals; a justification of the entry, &c. under an immemorial custom, and justification of the entry, &c. subject to his making compensation to the plaintiff for surface damage; replication, taking issue upon the plea, of not possessed, traversing the unqualified right of entry, and alleged a demand of compensation and refusal; the plaintiff recovered a verdict upon the issue on the unqualified right, but the jury found that the defendant had tendered a reasonable compensation for damage done, and a verdict was entered for him on the issue on the qualified right: Held, that under the issue on the plea of not possessed, the defendant was entitled to the costs of witnesses subpœnaed but not examined to prove his right of entry, but that those costs must be estimated separately, and as contradistinguished from those which arose upon the issue on the right to dig and carry away the minerals.—*Paddock* v. *Forrester*, 2 D. P. C. (N. S.) 125.

4. (*Costs of the day, execution for.*) Semble, that where a party has obtained a rule absolute for costs of the day, and he has procured the costs to be taxed, and the master's allocatur to be indorsed on the rule, he may issue execution under 1 & 2 Vict. c. 110, s. 18, for the amount of those costs, without any fresh rule of Court, specifying in distinct terms what the amount is.

   The Court, upon an application for such a fresh rule, refused to entertain the motion, and left the party to proceed at his own peril.—*Hobson* v. *Paterson*, 2 D. P. C. (N. S.) 129.

5. (*Costs of the day, practice on rule for.*) Cause cannot be shown in the first instance against a rule for costs of the day for not proceeding to trial according to notice, although notice of the motion has been given to the plaintiff.—*Alderley* v. *Storey*, 2 D. P. C. (N. S.) 335.

6. (*Certificate under the* 3 & 4 *Vict. c.* 24.) A certificate under the 3 & 4 Vict. c. 24, s. 2, is granted in time, though not applied for till the next morning after one of the jurors in another cause has been sworn, and not actually granted till all of them have been sworn. (8 M. & W. 281, 677.)—*Nelmes* v. *Hedges*, 2 D. P. C. (N. S.) 350.

7. (*Taxation—Costs of declaration and particulars.*) The defendant was served with the writ of summons on the 1st of October; on the 7th, before appearance, he applied to the plaintiff to settle the action, and terms were agreed on: upon taxation of costs (at which the defendant did not attend, though served with a notice), the master allowed the plaintiff the costs of a declaration and particulars. It did not appear that the dates had been brought before the master. The Court made absolute a rule to review the taxation, but directed that the costs

of the motion should be in the discretion of the master.—*Pook* v. *Burrows*, 2 D. P. C. (N. S.) 358.

And see COURT OF REQUESTS ACTS; EVIDENCE, 3; METROPOLITAN POLICE ACT; PAUPER.

COURT OF REQUESTS ACTS.

Under the Birmingham Court of Requests Acts, 28 Geo. 2, and 47 Geo. 3, if a plaintiff recover less than 5*l.*, he is not entitled to costs, although he may bonâ fide have brought his action for a much larger sum. (5 Bing. N. C. 194; 4 Taunt. 150.)—*Allen* v. *Turner*, 2 D. P. C. (N. S.) 21.

COVENANT.

1. *(Of lessee to pay "parliamentary taxes"—Repair of bridge ratione tenuræ.)* At common law, the liability to repair bridges ratione tenuræ is thrown ultimately on the owner of the land, as between him and the occupier, though primarily, as far as the public are concerned, the occupier may be chargeable.

Where by certain acts of parliament it was provided that the owners of certain lands, liable ratione tenuræ for the repairs of a bridge, might make rates on such lands for the more conveniently raising the funds necessary for such repairs, and the lessee of a portion of such lands covenanted with the owner to pay his rent, "free and clear of and from any land tax, and all other taxes and deductions whatsoever, either parliamentary or parochial, then already taxed or imposed, or thereafter to be taxed or imposed upon the premises, or upon the lessor, property tax or duty only excepted."

Held, that the covenant did not extend to make the lessee liable to pay a rate imposed on the demised premises for the repairs of such bridge.—*Baker* v. *Greenhill*, 2 G. & D. 435.

2. *(Where covenantees may sue severally.)* Though an agreement be made jointly with two parties, yet where the interests are several and the damages several, each of the covenantees may sue without joining the other. (5 Rep. 7 a.)—*Palmer* v. *Sparshot*, 4 Scott, N. R. 743.

3. *(When debt lies on.)* Debt will not lie against one of several covenantees, on a covenant by them, or some or one of them, to pay a sum of money. (4 M. & W. 130; 7 D. P. C. 482; Vin. Abr. Debt (D.) pl. 3.)—*Harrison* v. *Matthews*, 2 D. P. C. (N. S.) 318.

And see PLEADING.

COVENANT FOR QUIET ENJOYMENT.

(Distress for land tax, no breach of.) A distress upon demised premises for land tax due from the lessor before the demise, is not a breach of his covenant that the lessee shall enjoy "without any disturbance, &c. of or by him the defendant, his heirs or assigns, or any other person or persons lawfully claiming, or to claim by, from, or under him or them," because the claim for land tax was a claim, not through him, but against him.—*Stanley* v. *Hayes*, 2 G. & D. 411.

COVENANT TO REPAIR.—See LEASE.

CROWN DEBTOR.

(Discharge of, how obtained.) Semble, that since the abolition of the Pipe Office, from which a quietus would have been granted to a crown debtor, on his satisfying the demands of the crown, it will be sufficient to produce to the senior master of the Court the written consent of the accountant-general of the Exche-

quer, together with a certificate of the payment of the debt due to the crown from the proper officer of the Exchequer, to authorize him to enter a discharge in his "Index to Debtors and Accountants to the Crown," under 2 Vict. c. 11, s. 9.

Where a loan had been granted under the 1 & 2 Will. 4, c. 24, by the Exchequer Bill Loan Commissioners for a public work, which sum was secured on certain landed estates, the Court allowed such a discharge to be entered, upon the production of a certificate of the repayment of the sum due, signed by the loan commissioners, and of the written consent of the accountant-general.—*Ex parte Fleetwood*, 2 D. P. C. (N. S.) 119.

CUSTOM.—See ACTION ON THE CASE; MANOR.

DECEIT.

(*Case for, when maintainable—Fraudulent representation, what amounts to.*) A collateral statement, made at the time of entering into a contract, but not embodied in it, must, in order to invalidate the contract on the ground of its being a fraudulent statement, be shown not only to have been false, but to have been known to be so by the party making it, and that the other party was thereby induced to enter into the contract. (Per Parke, B., and Alderson, B.; Lord Abinger, C. B., dissentiente.)

A cargo of coffee was sold by a broker, for H., P. & Co. Liverpool; and the words "invoiced to the sellers as of first shipping quality," were introduced into the bought and sold notes. At the same time the invoice was shown to the buyers, which stated the cargo to be shipped by H., Brothers & Co., consigned by H., P. & Co., for sale on account and risk of whom it may concern—3150 bags "first shipping quality." H., Brothers & Co. were a branch house at Rio de Janeiro, composed of the same partners as the firm of H., P. & Co.: Held, in an action on the case against H., P. & Co. for deceit, that it was a proper question for the jury, whether the invoice imported that the coffee was invoiced to the defendants by distinct parties as the sellers thereof.

Quære, whether the action ought not to have been brought upon the contract, instead of in tort.—*Moens* v. *Heyworth*, 10 M. & W. 147.

DEBT. See COVENANT, 3.

DEMURRAGE.

(*Lay days, calculation of.*) By a charter-party made in London, upon a vessel for a voyage from London to Honduras and back to some port in the United Kingdom, 25 running days for every 100 tons of mahogany were to be allowed for loading the ship at Honduras, and 15 days for discharging at the destined port in the United Kingdom: Held, that in the absence of any custom, Sundays were to be computed in the calculation of the lay days at the port of discharge.

The ship arrived at Hull, the port of her destination, on the 1st of February, and was reported; on the 2nd, she had entered the dock, and was given in charge of the dock officer, but did not get to the place of unloading till the 4th, in consequence of the full state of the docks, the officer refusing to take her out of her turn; and the discharge was not completed till the 22nd: Held, that the lay days were to be calculated from the period of her arrival in *dock*, and not at the place of unloading. (3 Esp. 121.)—*Brown* v. *Johnson*, 10 M. & W. 331.

DRAINAGE ACT.

By an act of 4 & 5 Vict. c. 113, trustees were appointed for the purpose of the

more effectual drainage, by means of a steam engine, of a fen district in Lincolnshire, called the Bourn North Fen and the Dyke Fen; and by the 62nd section it was enacted, that every engine, machine, building, and work, to be erected and made by the trustees under the powers of the act, and all engines, machinery, buildings, &c., sewers, *drains, watercourses*, &c. &c., and other works *already made, or then existing or provided* for the drainage of the Bourn North Fen and Dyke Fen, and which should be thereafter made and provided for such purpose, and the right to and property in them, should be and they were thereby vested in the trustees: with a proviso, that nothing *in the act* contained should extend to or affect any engines, machinery, &c., sewers, drains, watercourses, &c., and other works already made, or then existing or provided for the drainage of the said fens, and then vested in and under the control of certain commissioners appointed under a former inclosure and drainage act, called the Black Sluice Commissioners. And sect. 64 enacted, that it should be lawful for the trustees, upon any land in Bourn North Fen and Dyke Fen, *not vested in the Black Sluice Commissioners*, to make and erect a steam engine, with all proper machinery, with proper and convenient buildings, *sluices*, pits, and other necessary works; and to make and from time to time maintain, repair, and improve, as occasion might require, the sluices, bridges, cuts, sewers, and other works, already or thereafter to be made in, upon, and through the said fens, for effectually draining the same, out of the funds to be raised under the authority of the act, and making compensation for the damage.

Held, that the trustees had no power, under this act, to widen a drain under the control of the Black Sluice Commissioners, from the width of eighteen to forty feet, for the purpose of a reservoir, to bring a sufficient supply of water to their steam engine, thereby cutting away upwards of three acres of the land vested in the commissioners, although such widening was itself an improvement of the drainage; and that they had no power to make any reservoir on the land vested in the commissioners, although the making of a reservoir was necessary to the proper working of the engine for the purposes of the drainage, and none could be made without cutting into some of the banks or drains vested in the commissioners.—*Smith* v. *Bell*, 10 M. & W. 378.

EASEMENT.

(*Obstruction of window-light—Custom of London.*) Case for obstructing window-light in the city of London by building. Plea: that, by the custom of the city, the owner of a house on ancient foundations may at any time build on them so as to darken the window of his neighbour, though that also be ancient, unless there be some agreement to the contrary; and justification under the custom. Replication under 2 & 3 Will. 4, c. 71, s. 3, of twenty years' enjoyment of the light: Held, on general demurrer to the replication, that the custom of London was no defence.—*Salters' Company* v. *Jay*, 2 G. & D. 414.

EJECTMENT.

1. (*Service.*) An affidavit of service of a declaration in ejectment must state positively, and not inferentially, the service to have been effected on the tenant in possession.—*Doe* d. *Dolby* v. *Hitchcock*, 2 D. P. C. (N. S.) 1.

2. (*Costs of previous ejectment.*) Where successive ejectments are brought to recover the same property, but none of them have been tried, the Court will not stay the proceedings in a subsequent ejectment till the costs of the former actions

be paid. (3 Bos. & P. 22, n.)—*Doe* d. *Blackburn* v. *Standish*, 2 D. P. C. (N.S.) 26.

3. (*Rule for judgment.*) Where the notice at the foot of a declaration in ejectment is addressed to all the tenants in possession of distinct parts of the premises, and each tenant is served with a copy addressed to all, there should be only one rule for judgment. (2 C. & J. 670.)—*Doe* d. *Dorley* v. *Roe*, 2 D. P. C. (N.S.) 52.

4. (*Costs of previous ejectments.*) Where several actions of ejectment had been unsuccessfully brought to recover the same premises, and in a subsequent ejectment founded on the same title, possession was obtained of the premises as on a vacant possession, the Court compelled the lessor of the plaintiff to stay proceedings until the costs of the former ejectments were paid.—*Harvey* d. *Beal* v. *Baker*, 2 D. P. C. (N. S.) 75.

5. (*Affidavit—Description of demise.*) An affidavit, in an action of ejectment, entitled "John Doe on the demise or demises of A. and B.," is insufficient, and a rule to set aside the judgment having been obtained on such affidavit, the Court held that the lessor of the plaintiff was entitled to discharge it for this defect, but without costs.—*Doe* d. *Neville* v. *Lloyd*, 2 D. P. C. (N. S.) 330.

6. (*Service.*) The declaration was served on the servant of the tenant on the premises, who promised to convey the papers to his master, and the premises were subsequently found to be deserted. The Court refused to grant even a rule nisi for judgment against the casual ejector.—*Doe* d. *Dobler* v. *Roe*, 3 D. P. C. (N. S.) 333.

7. (*Same.*) Where the declaration and notice were served on the son-in-law of the tenant, near the premises, and afterwards a summons for particulars was taken out by the attorney of the tenant, the Court granted a rule nisi for judgment. —*Doe* d. *Evans* v. *Roe*, 2 D. P. C. (N. S.) 334.

8. (*Same.*) The lessor of the plaintiff having proceeded as on a vacant possession, but his remedy under the statute having been defeated by the tenant's serving notice that he disputed the lessor's title, and the tenant having afterwards avoided service of the declaration and notice in ejectment, true copies of which were however left with a female with whom he cohabited on the premises, the Court granted a rule nisi for judgment against the casual ejector, and directed that service thereof on the premises should be deemed good service.—*Doe* d. *Croley* v. *Roe*, 2 D. P. C. (N. S.) 344.

9. (*Title of declaration.*) The Court refused a rule for judgment against the casual ejector, where the declaration served was dated of a wrong year, the notice bearing no date; even though the service had been personally effected in the month of September, and the notice required the tenant to appear "next Michaelmas Term." (8 Scott, 385; 6 D. P. C. 184.)—*Doe* d. *Rogers* v. *Roe*, 2 D. P. C. (N. S.) 392.

10. (*Second writ of possession.*) Where, in ejectment, a writ of habere facias possessionem has been executed in respect of the premises in question, and possession given to the lessor of the plaintiff, but the tenant subsequently comes and forcibly dispossesses him, the Court will grant a new writ; but the rule for such writ is nisi only in the first instance.—*Doe* d. *Lloyd* v. *Roe*, 2 D. P. C. (N. S.) 407.

EMBEZZLEMENT.

The offence of embezzlement necessarily involves secrecy and concealment. If,

therefore, instead of denying the appropriation of property, the servant, in rendering his account, admit the appropriation, alleging a right in himself, however unfounded, or setting up an excuse, however frivolous, he cannot be convicted of embezzlement.—*Reg.* v. *Norman*, 1 C. & M. 501.

EVIDENCE.

1. (*Notice to produce, when in time.*) In a town cause for goods sold, in which the defendant and his attorney both lived in town, a notice to produce a letter from the plaintiff to the defendant, asking payment, was served at the office of the defendant's attorney at 7 p.m. on the evening of the day before the trial: Held, in time.—*Leaf* v. *Butt*, 1 C. & M. 451; see also *Meyrick* v. *Woods*, id. 452.

2. (*Admission of document under judge's order, effect of.*) In an action on a bill of exchange, the defendant was, by a judge's order in the usual form, to make the admissions specified in the notice to admit: and the notice called on the defendant to admit that the document therein specified (the bill) "was written, signed, or executed, as it purports to have been, saving all just exceptions to the admissibility of such document as evidence in the cause:" Held, that this admission did not preclude the defendant from objecting that the bill was not properly stamped; and also that this was not such an admission as dispensed with the production of the bill.—*Vain* v. *Whittington*, 1 C. & M. 484.

3. (*Same—Costs.*) A defendant refused to admit the handwriting of a third person to a document, and the usual order was made for the costs of proving it. At the trial, the handwriting was proved, but the document was one which was inadmissible in evidence in the cause. The judge refused to certify for the costs of proving it.—*Phillips* v. *Harris*, 1 C. & M. 492.

4. (*Production of document by witness.*) A witness, being sworn, and having then in Court a document in his possession, is bound to produce it if required, though he have not received any subpœna duces tecum, or notice to produce.—*Snelgrove* v. *Stevens*, 1 C. & M. 508.

And see Ferry; Manor.

EXECUTOR AND ADMINISTRATOR.

(*Effect of plea of plenè administravit—Allowance for funeral expenses.*) A person who is sued as an executor, and pleads plenè administravit, admits thereby only that he is executor de son tort; and an executor de son tort is not liable to the amount of all the property of the testator that would pass by a will, but only for the amount of assets that come to his hands, against which he has a right to deduct reasonable funeral expenses. The usual allowance for funeral expenses to be paid from an insolvent estate is 20*l.*—*Yardley* v. *Arnold*, 1 C. & M. 434.

FALSE PRETENCES.

The prisoner (being a married man) paid his addresses to the prosecutrix, and obtained a promise of marriage from her, which she afterwards refused to ratify; he then threatened her with an action, and by this means obtained money from her. On an indictment against him for obtaining money under false pretences, the pretences laid being, first, that he was unmarried; secondly, that he was entitled to bring and maintain an action against the prosecutrix for breach of promise of marriage: Held, that the latter was a sufficient false pretence within the statute, and that there was evidence on which to find the falsehood of both pretences.—*Regina* v. *Copeland*, 1 C. & M. 516.

FERRY.

(*Liability of ferryman for negligence in landing of goods—Evidence.*) Declaration in case against the owners of a ferry stated, that the defendants were possessed of a ferry across the river Mersey from Woodside to Liverpool, and that the plaintiffs delivered to them certain goods, to wit, a phaëton, and certain jewellery and watches contained in it, to be by the defendants, for reward to them in that behalf, taken care of and carried in a certain steam-boat from Woodside to Liverpool, *and there landed* for the plaintiffs; that the defendants accepted and received the said carriage so containing the said jewellery and watches from the plaintiffs, and it became their duty to take proper care of them while they remained in their custody, and in and about the carriage, conveyance, *and landing* of the same as aforesaid. Breach, that the defendants took such bad care of the said carriage, jewellery, and watches, and so negligently conducted themselves in and about the carriage, conveyance, *and landing* of the same, that they were injured.

Plea, that the plaintiffs did not deliver to the defendants, nor did they accept and receive from the plaintiffs, the goods in the declaration mentioned, to be by them carried and conveyed in the steam-boat from Woodside to Liverpool, and *there landed* for the plaintiffs, for reward to them in that behalf, modo et formâ.

Held, that a contract to carry *and land* the carriage and jewellery, as stated in the declaration, could not be implied from the mere character of the defendants as owners of the ferry. But that it was a question for the jury, whether there was in fact a contract between the parties, either express or implied from usage, to receive the carriage on board, and to land it again at the end of the transit across the river.

It appeared that the plaintiff went on board the defendants' steam boat, with his horse and carriage, paying the defendants' charge for a "light four-wheeled phaëton;" that jewellery and watches of great value, which much increased its weight, were contained in a box under the seat; and that he made no communication of that fact to the defendants. The carriage was taken safely across the river, and on the arrival of the boat at the pier-head at Liverpool, two of the defendants' servants put the carriage out upon the slip, and commenced drawing it up the slip towards the quay, but in doing so were overpowered by its weight, and it ran down into the river, whereby the jewellery and watches were injured: Held, that the plaintiff's right of action for this injury was not affected by his not having communicated the fact of the jewellery and watches being contained in the carriage; held also, that it was a further question for the jury (supposing a contract to land were established), whether the landing was complete under the above circumstances.

Held, also, that to rebut evidence of a usage to take on board and land the carriages of passengers, a notice stuck up at the door of entrance for foot passengers to the slip at Woodside, but not visible to those who came with carriages, nor shown to have been known to the plaintiff,—that the defendants did not undertake to load or discharge horses or carriages, and would not be responsible for loss or damage thereto,—was not admissible.—*Walker* v. *Jackson*, 10 M. & W. 161.

FINES AND RECOVERIES ACT.

(*Conveyance of wife's estate.*) The Court refused to dispense with the concurrence of the husband of a married woman on an application by her, under the 91st section of the Fines and Recoveries Act (3 & 4 W. 4, c. 74), to be permitted to convey her interest in an estate, although it was stated that he and the applicant were living apart by mutual consent, and that he was in a "very nervous and

excitable state, and that it would be very difficult, if not impossible, to procure the execution by him of any deed," until it was sworn that an application had been made to him with that object, and refused.—*In re Murphy*, 2 D. P. C. (N. S.) 110.

FRAUDS, STATUTE OF. See PLEADING, 6.

INDICTMENT.

(*For unnatural practices—Certainty required in.*) Indictment against two persons, charging that they being persons of wicked and unnatural dispositions, did in a certain open and public place unlawfully meet together, with intent of committing with each other, openly, lewdly and indecently, in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices, and then and there unlawfully, wickedly, openly, lewdly and indecently did commit with each other, in the sight and view of divers of the liege subjects, &c. in the said public place there passing, divers such practices as aforesaid, to the great scandal and disgrace of mankind, in contempt, &c.: Held bad, in arrest of judgment, for want of certainty.—*Reg.* v. *Rowed*, 2 G. & D. 518.

INFANT.

(*Contract of, when binding.*) *Semble*, a contract of hiring and service for wages is a contract beneficial to and binding on an infant, though it contain clauses for referring disputes to arbitration, and for the imposition of forfeitures in case of neglect of duty, to be deducted from the wages.—(3 M. & Selw. 497; 3 B. & Cr. 484.)—*Wood* v. *Fenwick*, 10 M. & W. 195.

INTEREST.

(*On judgments.*) The stat. 1 & 2 Vict. c. 110, s. 17, allowing interest on judgments, applied as well to judgments for costs as for the subject matter of the action. Therefore, where it was sought to set aside a writ of ca. sa. on the ground that it commanded the sheriff to levy the amount of the defendant's costs on a nonsuit, with interest, the Court held that the motion could not be sustained.—*Pitcher* v. *Roberts*, 2 D. P. C. (N. S.) 394.

INTERPLEADER ACT.

1. (*Jurisdiction as to costs under.*) The assignees of a bankrupt, to whom certain goods were consigned, having set up a claim to the goods in the hands of the defendants, the carriers, the defendants applied to a judge under the first section of the Interpleader Act, and obtained an order, that unless cause were shown to the contrary on a day named, the assignees should be barred their claim, and pay the defendants' costs. The assignees attended on the day named, and objected to the payment of the costs by them, and the order was discharged. Several summonses were subsequently served, calling on the plaintiffs (the vendors) and the assignees to state the nature and particulars of their respective claims. The assignees did not attend on any of these summonses: Held, that the judge had no jurisdiction under the act to order the assignees to pay costs.—*Grazebrook* v. *Pickford*, 10 M. & W. 279; 2 D. P. C. (N. S.) 248.

2. Where a judge's order has been made for paying a certain sum of money out of Court to a claimant under an interpleader rule, the Court will not refuse to enforce that order because there is a creditor's suit pending in equity against the claimant, and an injunction granted, which has not been served on the officers of the Court.—*Smith* v. *Clinch*, 2 D. P. C. (N. S.) 48.

3. The Court will not grant an interpleader rule where an action has been brought

against the holder of a stake, deposited with him to abide the event of an illegal race.—*Applegarth* v. *Colley*, 2 D. P. C. (N. S.) 223.

JOINT STOCK BANKING COMPANY.

(*Action by—Declaration.*) In an action of assumpsit, the declaration alleged that the plaintiff was the public officer of certain persons united for carrying on the trade and business of bankers, according to the statute 7 Geo. 4, c. 46, and had been duly nominated and appointed, and then was one of the public officers of the said co-partnership, according to the force, form and effect of the said statute; and then claimed various sums of money for money lent, shares sold, and for work and labour of the said co-partnership done, performed and bestowed as the bankers of and for the defendant: Held, upon motion in arrest of judgment, that the declaration sufficiently disclosed that the co-partnership was actually carrying on the business of bankers.—(9 M. & W. 252; 6 M. & W. 570.) *Davidson* v. *Bower*, 2 D. P. C. (N. S.) 115.

JOINT STOCK COMPANY.

1. (*Right of shareholder to have his shares registered—Evidence of title to shares.*) Case against the secretary of the Anti-Dry-Rot Company, for not making out and delivering to the plaintiff a certificate in respect of each of twenty shares purchased by him. The act, 6 Will. 4, c. xxiv. provides that the capital shall be 250,000*l.* and that the number of shares shall be limited to 10,000: and the 16th section enacts, that the company shall keep a book, and cause to be entered therein the name and designation of every person subscribing for shares in the undertaking, and of every person entitled to any shares therein, making a separate entry of each share in numerical order; and that after the making of such entry a certificate shall be made out in respect of every share, specifying the number of such share and the name of the proprietor thereof, and such certificate shall be delivered to the proprietor upon demand. And the 20th section provides that it shall be lawful for the proprietor of every share to sell and transfer the same by writing duly stamped, which transfer shall be exhibited to the company, or their secretary, to be filed and registered in the manner prescribed by the act. At the trial, the plaintiff produced in evidence twenty scrip certificates payable to bearer, signed by three of the directors, and countersigned by one T., who had been secretary to the company. It appeared that T. had fraudulently re-issued a number of the shares, and this having become known, the shares, at the time the plaintiff purchased, were at a low discount. Notices had been given by the company in the public papers of the fraud which had been practised, and the broker who negociated the sale of the shares to the plaintiff knew of the fraud at the time. It appeared that at the time the scrip certificates were brought by the plaintiff to be registered, the whole number of 10,000 shares had been already entered in the register, pursuant to the act. It was thereupon objected that the register being full, and the defendants having no power to add to the number of shares, the action in this form would not lie; and the learned judge being of that opinion, nonsuited the plaintiff: Held, that the nonsuit could not be supported; because the register might have been improperly filled, in which case the company would be taking advantage of their own wrong.

Semble, that it was not sufficient for the plaintiff merely to produce scrip certificates payable to bearer, which he had required to be registered, but that he ought to have shown his title to have those shares registered, and to have deduced a good title from the original subscriber and his assignees.

It was also objected at the trial, that the plaintiff was not the bonâ fide holder of these shares, inasmuch as he had purchased them after notice that many shares were fabricated by a person who was himself a director and secretary of the company for a time, and that it might be that the plaintiff had acquired his title through some of those false certificates, and it was proved that the plaintiff had given a less price than the ordinary one; but *semble*, that that would not deprive him of the title he had by the transfer, unless it were shown that he was not the bonâ fide owner.—*Daly* v. *Thompson*, 10 M. & W. 309.

2. (*Action for calls—Pleadings.*) The 3 & 4 Vict. c. cxxvi. s. 1, provides, "that all actions or suits against any persons already indebted, or who may hereafter be indebted to the Monmouthshire Iron and Coal Company," and all other proceedings upon or in respect of any present or future liability to the said company, or upon any bonds, covenants, contracts, or agreements which already have been or hereafter shall be given or entered into to or with the said company, or wherein the said company is or shall be interested against any persons, whether they are or may have been proprietors of the said company or not, shall and lawfully may be commenced, prosecuted or carried on in the name of the secretary of the said company, &c.: Held, that under those provisions the secretary of the company was authorised to commence and carry on an action of debt for calls against a proprietor of shares in the capital of the company, and that the act was not intended to confer such a right upon him in actions between the company and third persons only.

In an action for calls by the secretary of the Monmouthshire Iron and Coal Company, the declaration alleged that the defendant was the duly registered proprietor of sixty shares in the undertaking, and recited, that by a certain indenture of settlement, bearing date, &c. to wit, the 25th of October, 1836, it was provided that there should be a board of directors of the said company, that the directors should meet together, and that it should be lawful for them, whensoever they thought proper, to come to a resolution that the proprietors of shares in the capital of the said company (except the proprietors for the time being, of certain shares in the said indenture mentioned, and thereby exempt from the payment of calls) should be called upon to pay at any time after the expiration of three calendar months from the time appointed for the payment of any previous instalment, such further instalment not exceeding 2*l.* 10*s.* upon every share in the said capital (except as aforesaid) as they should think necessary: it then went on to state that afterwards, and whilst the defendant was such proprietor, and after the execution by the defendant of the said deed of settlement, to wit, on the 22nd December, 1840, certain persons duly constituting and being a board of directors, duly made a call of money for the purposes of the company according to the provisions of the indenture of settlement, of and from the proprietors of shares in the capital of the said company, to wit, a call or instalment of 2*l.* 10*s.* upon every share (except the said exempted shares) to be paid and payable on the 16th of January then next; such call not being made so payable till more than three calendar months after the day appointed for the payment of any previous instalment; the plaintiff further alleged, that the proportion or instalment of the defendant so called for in respect of his said sixty shares in the capital of the said company amounted to a large sum of money, to wit, the sum of 150*l.*, by means whereof, &c.: Held, upon demurrer, that the declaration sufficiently showed that the shares of the defendant were not exempted shares referred to in the deed of settlement. Held, also, that it sufficiently appeared that more than

three calendar months had elapsed between the day appointed for the payment of the call sued for and any previous instalment, and that it also sufficiently appeared that more than three calendar months had elapsed between the day of payment of the call and the date of the indenture of settlement, it appearing from the act establishing the company, and which was a public act, that it received the royal assent on the 4th of August, 1840.—*Skinner* v. *Lambert*, 2 D. P. C. (N. S.) 132.

3. (*Sci. fa. against, when necessary.*) The stat. 4 & 5 Vict. c. lxxxix. s. 5, enables the "Patent Rolling and Compressing Iron Company," to sue and be sued in the name of their secretary: s. 11 enacts, that every judgment, &c. in any proceedings against such nominal party shall have the like effect (under certain circumstances) on the property of every shareholder, "as if every individual shareholder had been by name a party to such proceedings." Sect. 12 provides, that the plaintiff may cause execution on any judgment to be issued against all or any of the shareholders, &c. provided that no such execution shall be issued without leave first granted by the Court on motion in open Court: Held, that the shareholders could only be charged by sci. fa. *Semble*, it is necessary that motion be made in open Court for such sci. fa.—*Wingfield* v. *Barton*, 2 D. P.C. (N. S.) 355.

JUDGMENT.

(*Variance of fi. fa. from incipitur.*) The incipitur is not itself the judgment, but merely instructions for entering the judgment. Where therefore, in the judgment roll, the sum stated to be recovered agrees with the sum for which the fi. fa. issues, the fi. fa. cannot be set aside because it is for a less sum than is mentioned in the incipitur.—*King* v. *Birch*, 2 G.& D. 513.

JURY.

1. (*What treating of jury avoids verdict.*) Where two of the jury, during the progress of a trial which lasted two days, dined and slept at the house of the defendant on the evening of the first day, and consequently before the summing up: Held, that this did not avoid a verdict found for the defendant.

Held, also, that it was discretionary with the Court whether they would set aside the verdict and grant a new trial in such a case; and where the party making the application declared that he did not entertain any belief that the jurors, in giving their verdict, were influenced by their visit, and there were no grounds for suspicion of unfairness, the Court refused to set aside the verdict.—*Morris* v. *Vivian*, 10 M. & W. 137; 2 D. P. C. (N. S.) 235.

2. (*Challenge, when and how to be made.*) A challenge to the array or to the polls ought to be propounded in such a way at the trial as that it may be then put upon the nisi prius record, so that the other party may demur or counterplead, or deny the matter of challenge; and unless the challenges are so put on the record, the party is not in a condition as a matter of right to insist upon them.

Although the Court would probably in some cases, where a valid challenge has been made and over-ruled at nisi prius, but omitted to be put upon the record, grant a new trial, they will not do so where the party must have been aware of the ground of challenge before the trial, and might by moving to change the venue have obviated the objection.—*Mayor, &c. of Carmarthen* v. *Evans*, 10 M. & W. 274.

JUSTICES OF THE PEACE. See MANDAMUS.

LANDLORD AND TENANT.

1. (*Agreement of tenancy, construction of.*) By an agreement bearing date the 31st August, 1838, W. agreed to let R. take certain premises at a certain yearly rent payable quarterly, "to commence from 29th September next, and the first quarter's rent to become due and payable on the 25th December next," &c.; and at the end of the agreement was the following provision: "W. agrees to take the fixtures again at the expiration of R.'s tenancy, and to allow the price at which they may be valued, provided they are in as good condition then as they now are; and Mrs. R. agrees to leave the premises in the same state they now are:" Held, that under this agreement, the tenancy commenced on the 29th September, and that it was properly described in the declaration as an agreement to leave the premises at the expiration of the tenancy in the same state as they were in at the commencement of the tenancy, and not at the date of the agreement.—*White* v. *Nicholson*, 4 Scott, N. R. 707.

2. (*Right of tenant to dispute landlord's title.*) Payment of rent to, or even an express agreement with one who claims to be landlord, does not preclude the tenant from afterwards showing that the party claiming had no title, and that the payment or other acknowledgment was induced by misrepresentation or under mistake, the tenant not having been originally let into possession by the claimant. (4 Taunt. 720; 2 Bing. 10; 3 Bing. 474; 11 Ad. & E. 307.—(*Claridge* v. *M'Kenzie*, 4 Scott, N. R. 796.

3. (*Obligation to repair.*) Where the tenant of a house undertakes by his agreement to keep it in as good repair as when he took it, fair wear and tear excepted, he is not entitled to quit upon its becoming uninhabitable for want of other repairs during the term; and the landlord is under no implied obligation to do any repairs in such a case.—*Arden* v. *Pullen*, 10 M. & W. 321.

LAND TAX. See COVENANT, 1.

LEASE.

(*Liability of underlessee for costs of lessee in action by lessor for breach of covenant to repair.*) A messuage and premises were demised to the plaintiff by a lease bearing date the 10th May, 1828, for the term of twenty-one years from the 25th of March then last; which lease contained covenants to paint the outside of the premises once in every three years, and the inside once in every seven years, and to repair and keep in repair the premises, and also to do any repairs which on a view of the premises by the lessor should be found wanting, of which notice should be given.

By a lease dated the 15th of June, 1830, the plaintiff demised the premises to the defendant for the residue of the term, wanting ten days, containing covenants, with the exception of a stipulation as to painting the outside wood-work, in precisely the same terms as those contained in the original lease. The original lessors having brought an action against the plaintiff for breaches of the covenant to repair, he applied to the defendant to perform the repairs, and for instructions as to the course he should pursue with respect to the defence of the action. The defendant denied that any notice to repair had been given, and insisted that the premises did not require it; the plaintiff thereupon offered to suffer judgment to go by default, which the defendant refused to assent to. The plaintiff then gave the defendant notice, that as he had denied that any notice to repair had been served, and insisted that the premises were not out of repair, he should traverse the breaches of covenant assigned, and try the question, holding

the defendant responsible for the costs. This he accordingly did, and the result was, that the original lessors recovered 68*l.* damages, and 58*l.* 12*s.* for costs, and he himself incurred costs amounting to 53*l.* 14*s.* 4*d.*

Held, that the plaintiff was not entitled to recover from the defendant the costs of defending the action, as they were not necessarily occasioned by the defendant's breach of the covenant to repair.

Held, also, that although the covenants contained in the sub-lease were (with the exception of that relating to the painting) the same in words as those contained in the original lease, they were in effect substantially different, the periods at which the leases were granted being different.

Semble, that the plaintiff ought to have paid the amount of the dilapidations into Court, instead of defending the action. (3 B. & C. 533; 7 M. & W. 601.) —*Walker* v. *Hatton*, 10 M. & W. 249; 2 D. P. C. (N. S.) 263.

And see COVENANT, 1.

LIBEL.

1. (*In giving character of servant—Evidence of malice.*) In answer to an inquiry as to the character of a governess, the defendant wrote a letter in which she said, "I parted with her on account of her incompetency, and not being ladylike nor good tempered."

To this letter there was the following postscript: "May I trouble you to tell her, that this being the third time I have been referred to, I beg to decline any further applications."

In an action by the governess against the defendant for writing this letter, she gave evidence tending to negative the statement in it of her qualifications, and she proved that previously the writer had recommended her as a governess. The judge directed the jury, that the letter being an answer to an inquiry into the character of a servant, primâ facie it was privileged; but that the letter itself and the facts proved were some evidence for them that the writer was actuated by express malice, to rebut any inference of which the defendant might have given evidence to show that the statement itself of the character was a true one, or that she believed, or had reason to believe, it to be a true one: Held, that this direction was right. (9 B. & A. 803.)—*Fountain* v. *Boodle*, 2 G. & D. 455.

2. (*Publication—Proof of identity of newspaper.*) In an action for a libel in a newspaper, a certified copy of the Stamp Office declaration was put in, which stated the title of the newspaper to be "The Leicester Herald and Midland Counties Advertiser," and the place of publication "No. 23, Charles Street, in the Parish of St. Margaret, in the borough of Leicester." The newspaper produced bore the same title, but the place of publication stated at the end of it was "at the corner of Charles Street and Hadfield Street, in the parish of St. Margaret, in the borough of Leicester:" Held sufficiently identified.—*Baker* v. *Wilkinson*, 1 C. & M. 399.

3. A. obtained a rule for a criminal information against B. for sending him a challenge, on an affidavit containing matters of high censure against B. The affidavit of B. on showing cause was highly recriminatory, and would under other circumstances have been libellous: Held, however, that B. was justified in setting forth in such an affidavit any matters respecting A.'s past conduct as he might think would disincline the Court to entertain the application for the rule, and therefore it could not be made the subject of an action for libel.—*Doyle* v. *O'Doherty*, 1 C. & M. 418.

LIMITATION, STATUTES OF.

(*Merchants' Accounts—Part payment.*) The exception as to merchants' accounts in the 3d section of the 21 Jac. 1, c. 16, is confined to cases where an action of account would lie, or an action upon the case for not accounting. (8 M. & W. 769.) Mutual dealings between tradesmen, each selling goods to the other, do not bring the case within the exception, unless there be some agreement that the sales on the one side shall be set against those on the other, and the balance be made payable.

In order to make a delivery of goods within six years operative to take a case out of the Statute of Limitations, there must be some evidence of an agreement that such delivery shall be deemed equivalent to payment. (2 C. M. & R. 45.) —*Cottam* v. *Partridge*, 4 Scott, N. R. 819.

MANDAMUS.

1. (*To justices, when granted.*) The Court refused to grant a mandamus to compel magistrates to hear a complaint and act summarily under the statutes relating to forcible entry and detainer.—*Ex parte Davy*, 2 D. P. C. (N. S.) 24.

2. (*To justices to levy poor rate.*) It is no objection to a rule for a mandamus to justices to issue a warrant of distress for the levy of poor rates, that it includes two separate and distinct rates.

Though there be more than two justices at petty sessions, all of whom take part in a decision whereby the issuing of a distress warrant to levy poor rates is refused, it is not necessary that, on an application for a mandamus, all who were present and took part in the decision shall be included in the rule, unless it appear that any have been omitted for an improper purpose.

On application for a mandamus to justices to issue their warrant of distress to levy poor rates, it appeared that the property in respect of which the rate was demanded was trust property, devised to maintain a free-school, and that one of the justices who refused the warrant was a trustee of the estate: Held, that he was nevertheless liable to the mandamus.—*Reg.* v. *Ellis*, 2 D. P. C. (N. S.) 361.

And see Poor Rate, 1.

MANOR.

(*Manorial custom—Evidence of customs of adjoining manor.*) On a question as to the existence of a custom in a particular manor, evidence of a like custom in an adjoining manor, though within the same parish and leet, is not admissible; not even though there be evidence to show that the latter manor was a subinfeudation of the former; at least, unless it be clearly shown that they were separated after the time of legal memory, since otherwise they may have had different immemorial customs.

Evidence of payment of an annual sum of 4*s.* by the lord of the manor of W. to the lord of the manor of C. "for the manor of W.," was held not to be sufficient evidence that W. was a subinfeudation of C.

A deed dated in 1605, made between the lord of the manor of C. of the one part, and a number of the copyholders of the manor of the other, reciting that the customs of the manor of and concerning their copyhold premises had immemorially been claimed to be as thereinafter expressed, proceeded to state in detail various alleged customs, among which no mention was made of any custom for the copyholders to take minerals. The deed then stated, that whereas, at the request of the said copyholders, and in consideration of 1500*l.* paid by them to

the lord, he had agreed that the said customs should be allowed, ratified, and confirmed, and that the copyholders were contented to submit to them, therefore the lord did thereby, for him and his heirs, allow all the said customs to be the true customs of the manor for and touching all the said customary and copyhold lands before mentioned; and the lord then covenanted with the said copyholders, that he, his heirs and assigns, should be bound by the said customs for ever, and that the copyholders, their heirs and assigns, should enjoy them for ever without interruption; and the copyholders covenanted with him that they would at all times thereafter submit themselves to and be bound by the said customs. It was then provided, that forasmuch as some matter or point of custom within the manor, not therein mentioned, might come in question, and doubts might be made of the true exposition of some matter or custom therein set forth, it was agreed between the parties that if any such matter, point, or custom, should come in question, it should be settled by a jury to be summoned as therein mentioned. And it was further agreed, that none of the ancient court rolls of the manor should be showed or taken to prejudice or impugn any of the customs therein specified. This deed was confirmed in terms by a decree in Chancery, which contained a clause providing that it should not, nor should the said customs, extend but to the complainants and defendants (the copyholders who were parties to the deed, and the lord), and to the complainants' copyhold tenements, and should not be prejudicial to the lord concerning any other copyholds in the manor.

Held, that this deed was admissible in evidence, against a copyholder deriving title under one of the parties to it, to negative the existence of a custom of the manor for the copyholders to take the minerals under their respective copyholds.

Semble, that it would have been evidence for the same purpose, even against a copyholder not deriving title under any of the parties to it.—*Marquis of Anglesey* v. *Lord Hatherton*, 10 M. & W. 218.

MASTER AND SERVANT. See COMMITMENT.

METROPOLITAN POLICE ACT.

(*Costs of party sued for act done under.*) In an action for trespass for an assault and false imprisonment, it appeared that the plaintiff was a constable, and the defendant a superintendent in the Metropolitan Police Force, and that the cause of action was the detention of the plaintiff in custody, for refusing to give up his police uniform, contrary to the police regulations. The plaintiff having obtained a verdict, it was held that the case did not fall within the operation of the 41st section of the 10 Geo. 4, c. 44, which provides that in an action brought for any thing done in the execution of that act, no plaintiff shall recover costs unless he obtains the certificate of the judge who tries the cause, and that the plaintiff was entitled to his costs without such certificate.—*Bartholomew* v. *Carter*, 2 D. P. C. (N. S.) 111.

MINES.

(*Construction of demise of.*) Covenant. By an indenture of lease, the plaintiff demised to the defendant all mines and beds of coal, &c., which then had been or thereafter during the demise should be discovered or opened under the lands belonging to Dyffryn House, at the yearly rent of 20*l.*, to be paid whether any coal should be worked or not, together with 7*d.* per ton for every ton of coal, &c. raised. And the defendant covenanted that he would at all times during the demise work the said mines in a proper and workmanlike manner. Breach, that

the defendant did not work the said mines in a proper and workmanlike manner, but, on the contrary, permitted the mines to lie and the same were wholly ungotten. Plea, that the said mines were never at any time before the said demise worked or gotten, nor did the defendant, at any time since or during the demise, work or get the mines: Held, on demurrer, that inasmuch as it appeared by the pleadings that the mines had not been worked at all, the defendant was not liable on this covenant for not working them in a workmanlike manner, the subject-matter of demise being, not all the mines under the lands specified, but only such as either had been or should be discovered or opened.—*Quarrington* v. *Arthur*, 10 M. & W. 335.

MINING COMPANY.

(*Evidence of partnership in.*) Where a defendant is charged with a debt as partner in a mining company, not being shown to have contracted personally, or to have represented himself to the plaintiff as a partner, the fact of his having been partner may nevertheless be shown by evidence short of strict proof that he had executed a deed of copartnership, or was legally interested in the mine. And admissions made by him, before or after the debt was incurred, are evidence for this purpose. (7 B. & C. 409; 6 M. & W. 461; 3 Scott, N. R. 466.)—*Ralf* v. *Harvey*, 1 Ad. & E. (N. S.) 845.

MUNICIPAL CORPORATION ACTS.

(*Non-signing of burgess list by overseer.*) An omission by an overseer, whether wilful or not, to sign the burgess list, required by the stat. 5 & 6. W. 4, c. 76, s. 15, subjects each overseer so neglecting to the penalty imposed by section 48. (4 P.& D. 207.)

Where the parish consists of several wards, a signature by one overseer to a list of the persons entitled to be on the burgess list for his own ward only, is not a sufficient compliance with the statute to exempt him from the penalty for not signing the list for the parish.—*King* v. *Share*, 2 G. & D. 453.

ORDER OF FILIATION.

An order of filiation made by the sessions under 2 & 3 Vict. c. 85, s. 1, recited that "if it had been duly certified to that Court that the defendant, having had due notice to appear, &c. did, at the petty sessions, &c. enter into a recognizance," &c. The Court of Queen's Bench, on motion for a certiorari, refused to entertain objections to the recognizance and to the summons whereby the defendant was required to appear before the petty sessions.

The order recited also, that it was duly certified that at a petty sessions, &c. the guardians and overseers of the poor of the parish of W. made information and application, &c. It appeared that W. formed part of the union of W. and B. On objection that the guardians only ought to have applied, held, that the order was sufficient, the addition of the words "and overseers" being immaterial.

The order further recited, that the guardians and overseers of the poor of the said parish of W., did charge T. G., of T., in the parish of A., &c. with being the putative father of the said bastard child, and did at the same petty sessions further apply to the justices for an order on the said T. G., &c. to reimburse *such* parish for the maintenance and support of such child, &c.: Held, that though the parish of A. was the last antecedent to "such parish," a reasonable construction must be put upon the sentence, and the parish of W. must be taken to be meant thereby.—*Reg.* v. *Goodall*, 2 D. P. C. (N. S.) 383.

ORDER OF REMOVAL.

1. (*When it sufficiently shows jurisdiction—Inhabitancy—Sufficiency of examination.*) Held, on an order for removal and examination being brought before the Court of Queen's Bench, on a return to a writ of certiorari, that the order sufficiently showed the jurisdiction of the justices, by stating a complaint by the churchwardens and overseers of, &c. that the paupers have come to inhabit in and are chargeable, &c., and that upon examination of the premises taken before us, "we do adjudge the same to be true, and that the paupers are settled in," &c.

It is not necessary, where an order is made on complaint of, and is addressed to, officers of a township, that it should be stated that the township is one which maintains its own poor.

An order of removal may be absolute, without reference to the provisions of the statute 4 & 5 Will. 4, c. 76, s. 79.

An examination which states that it was taken at S., that the mother is of S., and that she and her three children, of the ages respectively of seven years, three years, and one year, were poor and chargeable to S., sufficiently shows that they were inhabiting in S., so as to give the justices jurisdiction to remove them.—*Reg.* v. *Inhabitants of Rotherham*, 2 G. & D. 523.

2. (*Certiorari to bring up, examine, &c. after refusal of sessions to grant case.*) Where the Court of Quarter Sessions have heard and determined an appeal against an order of removal, and refused to grant a case for the opinion of the Court of Queen's Bench, on objection to the sufficiency of the examination, this Court will not grant a certiorari to bring up the examination, and the notice and grounds of appeal, for they are no part of the record of the sessions.—*Ex parte Churchwardens, &c. of Tollerton*, 2 G. & D. 533.

3. (*Examination—Statement of residence.*) An examination, in stating a settlement by hiring and service, stated that the pauper went to and served in the appellant parish for a year, as a cow-boy, at the wages of 50*s*. The sessions, subject to the opinion of this Court, found that residence sufficiently appeared: Held, that it did not. (1 G. & D. 706; 2 G. & D. 82.)—*Reg.* v. *Inhabitants of Stoneleigh*, 2 G. & D. 535.

4. (*Examination—Removal under former order—Evidence—Admission of appellant parish.*) An examination, on which an order of removal was founded, stated a derivative settlement from the father of the pauper in the appellant parish, and that on a former occasion the pauper's brother's wife had been removed on an order founded on an examination stating the same derivative settlement from the father on which order the appellant parish had, without appeal, received the said wife; on appeal these facts were received in evidence, to show an admission by the appellant parish of the father's settlement: Held, that they were properly admitted for that purpose.—*Reg.* v. *Inhabitants of Sowe*, 2 G. & D. 537.

5. (*Jurisdiction of Justices—Sufficiency of examination—Certiorari.*) Jurisdiction is given to magistrates to make an order of removal upon due complaint of inhabitancy and chargeability in the complaining parish, and statement of settlement in the parish removed to, and such jurisdiction does not depend upon the facts of such inhabitancy, chargeability, or settlement. The insufficiency therefore of the examination, which is merely evidence of such facts, does not affect the jurisdiction of the magistrates, but merely shows they have come to a wrong conclusion. The Court will not revise the conclusion of the removing magistrates, however erroneous it may be, when once the jurisdiction appears. The

Court, therefore, will not issue a certiorari to bring up an order of removal, upon affidavits setting out the examination, although it may contain no evidence of inhabitancy or chargeability, if the order itself states a proper complaint of such inhabitancy and chargeability. Where the parish of "All Saints, Poplar," appealed against an order of removal made upon it by the description of "Poplar" only, the Court refused a certiorari applied for on the ground of such misdirection.—*Reg.* v. *Justices of Buckinghamshire*, 2 G. & D. 560.

OUTLAWRY.

1. (*Costs.*) On making absolute a rule for setting aside proceedings in outlawry, pursuant to the usual application, on payment of costs, the Court will not limit the period within which those costs shall be paid.—*Bennett* v. *Gardener*, 2 D. P. C. (N. S.) 50.

2. (*Right of outlaw to appear in Court.*) Where a defendant applied to set aside a warrant of attorney at a time when the plaintiff had already taken proceedings to outlawry, and pending the rule nisi the outlawry was completed, the defendant was held to be entitled to come in to make his rule absolute.—*Byrne* v. *Manning*, 2 D. P. C. (N. S.) 403.

And see PROCESS, 5.

PARTICULARS.

1. (*Amendment of.*) In 1837 the plaintiff commenced his action for work and labour done, and in that year delivered his bill of particulars. The cause was not tried until December, 1841, and was then referred. The Court, in the following Trinity term, and pending the reference, allowed the plaintiff to deliver an amended bill of particulars, containing new charges, extending over the same period with those specified in the first bill, there being no objection raised by the defendant, that he would not have agreed to the reference if the amended bill had previously been delivered.—*Blount* v. *Cook*, 2 D. P. C. (N. S.) 89.

2. (*When demandable.*) The Court will not order the delivery of particulars in an action of trespass, on the mere statement of the defendant that he does not know the grievances intended to be relied on; some special grounds for the application must be shown.—*Horlock* v. *Lideard*, 2 D. P. C. (N. S.) 277.

And see BANKRUPTCY, 4; PARTNERSHIP.

PARTNERSHIP.

(*Right of attorney to bind his partner by promissory note—Particulars of demand.*) One partner of a firm of attornies has no authority to make a promissory note in the name of the firm, though for money delivered to him in the course of business, to be invested by the firm on mortgage. *Quære*, whether a note so given is evidence of an account stated by the firm with the payee. (7 B. & C. 635.)

The particulars of the demand were, "this action is brought to recover the sum of, &c. due on the promissory note mentioned in the first count of the declaration; above are the particulars of plaintiff's demand, for the recovery whereof she will avail herself of the whole or any part of the declaration." *Semble*, the plaintiff is precluded from going into evidence on the count upon the account stated.—*Hedley* v. *Bainbridge*, 2 G. & D. 483. See also *Levy* v. *Pyne*, 1 Car. & M. 453.

PATENT.

1. (*Novelty—Specification.*) In an action upon the case for an infringement of the patent for "a new or improved process or manufacture of silk, and silk in combi-

nation with certain other fibrous substances," the declaration, setting out the letters-patent, alleged that the defendant, after the making of the said letters-patent, and within the term of years therein mentioned, and within that part of the United Kingdom called England, unlawfully and without the licence or consent, and against the will of the plaintiffs, made, used, and put in practice the said invention: Held, that this was supported by evidence that the defendant gave an order in England for the making of the article by the plaintiff's process, and that the order was executed and the goods received in England by the defendant.

The second plea stated, that the plaintiffs were not the true and first inventors of the alleged new and improved process or manufacture, &c.; and the third, that the alleged invention was not new. By their specification, the plaintiffs declared the nature of their alleged invention to consist of eight several and distinct parts or heads; the sixth being, "the application of their improved process to the throstle machine on the principle of the long ratch, for the new and useful purpose of spinning silk waste;" and the seventh, "certain improvements effected by them in the throstle machine, by which its utility in spinning silk-waste was greatly augmented." After describing the old process of converting silk-waste into yarn, the specification proceeded to describe the novel process by which the plaintiffs produced their new or improved manufacture, and referring to certain drawings, continued, "the annexed drawing for the most part represent the well-known spinning frame called a throstle, on the principle of the long ratch, as employed in the spinning of flax; which machine, combined with the improvements we have applied to it, we apply to the new and useful purpose of spinning silk-waste of long fibres, in combination of flax or wool;" and the specification concluded thus—"We desire it to be understood we disclaim those parts of the process or mechanism which were or may have been previous to the granting of our patent well known or in use for the same purposes; but we restrict our claims to the eight several heads of invention mentioned in the early part of the specification, all of which we believe to be new and of great public utility:" Held, that this was a claim either of a new invention, or a new combination of parts of the throstle machine, and, the jury having found "that the invention was not new, but an improved process, not a new combination," that the defendant was entitled to the verdict upon these issues.

The fifth plea, after setting out the specification, alleged that the plaintiffs did not within six calendar months next and immediately after the date of the letters-patent, inrol in chancery any instrument in writing, under the hand and seal of the plaintiffs, or either of them, particularly describing and ascertaining the nature of the invention, and in what manner the same was to be performed, other than and except the instrument in that plea mentioned and set forth; and then proceeded to allege that that instrument did not particularly describe and ascertain the nature of the supposed invention, and in what manner the same was to be performed. Issue being joined upon this allegation, and found for the plaintiffs: Held, that it was not competent to the defendant to move in arrest of judgment, on the ground that the specification so set out was insufficient in law. —*Gibson* v. *Brand*, 4 Scott, N. R. 844.

2. (*Notice of objections under* 5 & 6 *W.*4, *c.* 83—*Specification*—*Novelty.*) In an action for the infringement of a patent, the defendant cannot, by his notice of objections given under the stat. 5 & 6 W. 4, c. 83, s. 5, go beyond his pleas.

In an action for infringing a patent for blocks for pavement, the plaintiff claimed as his invention that his block was bevilled both inwards and outwards on the

same side of the block. The specification did not state at what angle the bevils should be made; one witness stated that the angle would be material, but another said that any angle would be beneficial: Held, that if the jury were of the latter opinion, the specification would be sufficient.

The patent was taken out for blocks for paving with "stone or any other suitable material:" Held, it would include wood pavement, though not in actual use nor in the contemplation of the inventor at the date of the patent.

Semble, that if an invention for which a patent is granted, would, if put into practice, be useful, an action may be maintained for its infringement, though the invention has never been brought into actual use except by defendant when infringing the patent.—*Macnamara* v. *Hulse*, 1 C. & M. 471.

PAUPER.

1. (*Costs.*) A pauper is exempt from the payment of interlocutory as well as final costs, except in cases within the rule of H., 2 W. 4, s. 110, for not proceeding to trial pursuant to notice.—*Pratt* v. *Delarue*, 2 D. P. C. (N. S.) 322.

2. (*Admission after commencement of suit—Costs.*) A person may be admitted to sue in formâ pauperis at any time during the progress of a suit; but in such case is liable, on a nonsuit or verdict for the defendant, to costs up to the time of the order.—*Doe* d. *Allis* v. *Owens*, 2 D. P. C. (N. S.) 426. See also *Pilcher* v. *Roberts*, id. 394.

PERJURY.

1. (*Variance—Abbreviations of legal proceedings—Title of affidavit—Amendment.*) An office copy of a bill in Chancery, which a witness had examined with the original, but which copy contained abbreviations, such as "pnl. este." for "personal estate," was held not to be evidence to support an allegation of a bill in Chancery on an indictment for perjury committed in an affidavit in that suit.

An affidavit was sworn in a cause of "The Commissioners of Charitable Donations and Bequests in Ireland agst. J. E. D.," and in an indictment for perjury the affidavit was alleged to be entitled in that cause; it was, in fact, entitled "The Commissioner," &c., instead of "Commissioners." The judge allowed an amendment at the trial.—*Reg.* v. *Christian*, 1 C. & M. 388.

2. (*Judgment, how proved.*) An allegation in an indictment for perjury, that judgment was "entered up" in an action, is proved by the production of the book from the judgment-office in which the incipitur is entered. (9 D. P. C. 872.) —*Reg.* v. *Gordon*, 1 C. & M. 410.

PHYSICIAN.

A physician cannot sue for his fees for anything he has done as a physician, either in attending or in prescribing medicine for a patient; but if he acts as a surgeon, or in any other capacity than that of a physician, he may mainrain an action for a compensation for what he has done, provided he can show it was not done by him as a physician; and the fact that he was not paid fees at the times when he was consulted, is evidence to show that he was not acting as a physician. (1 C. & M. 277.)—*Little* v. *Oldaker*, 1 C. & M. 370.

PLEADING.

1. (*Payment—Rule of T. T.*, 1 *Vict.*) Where, in assumpsit by payee against drawer of a bill of exchange, the defendant pleaded payment into Court of the amount of the bill against the further maintenance of the action, the rule of T. T. 1838, applies to exclude evidence that the bill had in fact been paid before

action, for the purpose of inducing the jury to give no interest, by way of damages, from the date of such payment.—*Adams* v. *Palk*, 2 G. & D. 450.

2. (*Videlicet.*) To debt on bond, the defendant, after setting out the bond, which recited that G. had been appointed clerk to a banking company, and was conditioned for his fidelity while in the service of the company, pleaded that before any breach, "to wit, on the 1st January, 1836," G. was appointed manager; that the office of manager is different from that of clerk, and the responsibilities greater; that G. did, from the day and year aforesaid, cease to be clerk of the company, and that he performed the condition whilst he was clerk, and before he was appointed manager: Held, on special demurrer, that the plea was bad, because the time of G.'s appointment as manager being immaterial, and laid under a videlicet, the plea, if put in issue, might have been supported by proof that G. had been appointed manager on some day previous to the day mentioned, and that he ceased to be clerk on the day mentioned or some subsequent day, so as to leave an interval between the appointment to be manager and the ceasing to be clerk, and therefore the plea did not show that G. ceased to be clerk when he became manager.—*Anderson* v. *Thornton*, 2 G. & D. 502.

3. (*Duplicity.*) Declaration in case stated, that the defendant was the agent of the plaintiff and P. for managing a plantation in the island of St. Christopher; that the plaintiff resided in England; that the plaintiff and P. were beneficially interested in the above estate in undivided moieties, and that the defendant was authorized by the plaintiff and P. to draw bills in their joint names, for the payment of monies owing by them in respect of supplies and necessaries for the estate, and the necessary expenses incurred in its management; that certain demands had been made by persons in the island upon P., for the payment of debts due from her, P., for necessaries supplied for the benefit of the estate before the defendant's appointment as agent, and for which, as the defendant knew, the plaintiff was not liable. Breach, that the defendant, in violation of his duty, and without the knowledge or consent of the plaintiff, and for the purpose only of providing funds to satisfy the debts so owing by P., drew a bill in the joint names of the plaintiff and P., which was refused acceptance, and on which the plaintiff and P. were sued to judgment by the holder in the Court of Queen's Bench in St. Christopher, and to satisfy which judgment their estate was sold. Plea, that the said necessaries, in respect of which the said bill was drawn, were provided for the benefit as well of the rights and interests of the plaintiff as of P. in the said estate, while they were jointly interested therein as in the declaration mentioned, and for their joint benefit, and that as well the rights and interests of the plaintiff as of P. in the estate were, according to the laws of the island, liable to the payment of that debt; and that the defendant, by the authority and with the leave and license of the plaintiff and P., drew the said bill: Held, on special demurrer, that the plea was bad for duplicity: Held, also, that the first part of the plea amounted to not guilty, inasmuch as in effect it denied the wrongful act alleged in the declaration, viz. the drawing of the bill for a purpose for which the defendant had no right under his authority to draw it.—*Pickwood* v. *Neate*, 10 M. & W. 206.

4. (*Replication of nul tiel record—Counsel's signature.*) A replication of nul tiel record, although it conclude with an ordinary verification, does not require counsel's signature, and the erroneous conclusion does not render it a nullity, so as to entitle the defendant to sign judgment of non pros.—*Thompson* v. *Nicholas*, 10 M. & W. 330; 2 D. P. C. (N. S.) 226.

5. (*Informal replication de injuriâ—Accord and satisfaction.*) To a declaration against the acceptor of a bill of exchange for 16*l.* 12*s.*, drawn by F. and G., and indorsed by them to the plaintiff, the defendant pleaded as follows: 1st, That after the bill became due, F. and G., being then the holders, applied to the defendant for payment of the bill; that the defendant paid them 7*l.* 2*s.*, which, together with the price of a horse which the defendant had sold to F. and G., and the price of which, it was agreed between them, should be set off and allowed against the defendant's acceptance, F. and G. accepted in satisfaction and discharge of the bill; and that the bill was not indorsed to the plaintiff until after the said satisfaction and discharge, and after it became due. 2ndly, That before the bill came into the possession of the plaintiff, it was indorsed in blank by F. and G. to C. and Co.; and that after it became due, it being then in the hands of C. and Co., F. and G. gave C. and Co. another bill, accepted by them, for the same amount, which C. and Co. received on account of the first-mentioned bill, and which was paid by F. and G. at maturity; that after the second bill was so given, the defendant paid to F. and G. 7*l.* 2*s.*, &c. &c. [as in the first plea]; that at the time of the giving of the second bill by F. and G. as aforesaid, and at the time of the said settlement between the defendant and F. and G., the bill in the declaration mentioned remained in the hands of C. and Co., and was not indorsed to the plaintiff until after the giving of the second bill by F. and G., nor until after it became due. To each of these pleas the plaintiff replied, "that the said plea, and the statements therein contained, in manner and form as the same are therein pleaded, are not true in substance and in fact;" concluding to the country.

Held, first, that the replication was bad on special demurrer, as being an informal de injuriâ: secondly, that the pleas were bad in substance, because they did not show that the sum paid by the defendant, together with the price of the horse, equalled the amount of the bill of exchange.—*Mitchell* v. *Cragg*, 10 M. & W. 367; 2 D. P. C. (N. S.) 252.

6. (*Plea of statute of frauds.*) To a declaration in assumpsit for goods sold, the defendant pleaded, that at the time when the defendant became indebted to the plaintiff as in the declaration mentioned, he became indebted upon a contract for the sale of the goods therein mentioned, for a price exceeding 10*l.*; that the defendant, being the buyer thereof, did not accept nor actually receive the goods or any part thereof, nor give or pay anything in earnest or to bind the bargain, or in part of payment, nor was any note or memorandum in writing of the bargain made and signed by the defendant or by his agent thereunto lawfully authorized: Held bad on special demurrer, as being an argumentative denial of the contract stated in the declaration. (5 M. & W. 456. Overruling *Maggs* v. *Ames*, 4 Bing. 470.)—*Leaf* v. *Tuton*, 10 M. & W. 393; 2 D. P. C. (N. S.) 300.

7. (*Frivolous demurrer—Covenant or assumpsit.*) Declaration in assumpsit stated, that a warrant of attorney had been given to secure a sum payable in respect of a sale of a business, and that afterwards, in consideration of the forbearance of legal proceedings in respect of an alleged breach of stipulation as to the goodness of the business, a deduction was made in the sum secured by the warrant, and further time given for payment of the residue, and that default had been made in payment of certain sums which became due under the parol agreement. The Court held a demurrer to this declaration, on the ground that the form of action should have been covenant and not assumpsit, frivolous, and set it aside on motion.—*Twight* v. *Prescott*, 2 D. P. C. (N. S.) 4.

8. (*Set-off in covenant.*) In covenant, the defendant cannot plead a set-off of a sum alleged to be due on a guarantee under seal given by the plaintiff to the defendant.—*Williams* v. *Flight*, 2 D. P. C. (N. S.) 11.

9. (*Replication de injuriâ.*) Although in an action of assumpsit the plaintiff may reply de injuriâ to a plea alleging matter of excuse, he is not bound to do so, but may traverse the material allegations in the plea.—*Garten* v. *Robinson*, 2 D. P. C. (N. S.) 41.

10. (*Demurrer, statement of grounds of—Replication de injuriâ.*) The rule which, upon demurrer, requires the statement of the ground of objection to any pleading in the margin of the paper books, by the party joining in demurrer, was intended for the advantage of the Court, and not of the parties. Where a plaintiff whose replication was demurred to, stated as his ground of objection to a plea, "that it afforded no answer to the action, and was bad in substance," it was held to be sufficient.

To an action on two bills of exchange, drawn by the plaintiffs on the defendant, and accepted by him, the defendant pleaded that before, &c. certain persons had agreed that they should form a public joint-stock company, on the pretext of carrying on the business of mining, &c., that they should act as a corporate body, and that the shares in the same should be transferable without restriction, notwithstanding that they had not, and should not obtain any act of parliament, or charter of incorporation, &c.; that the company being formed, they acted as such corporate body, &c., and carried on a certain trade and business as such, and that the undertaking and the project of the company was an attempt tending to the common grievance, prejudice and inconvenience of her Majesty's subjects, &c., that no act of parliament or charter of incorporation was obtained, and that while the company were so acting illegally, certain bills of exchange were given by them, of which the plaintiffs became and were the indorsees and holders; that it was afterwards agreed between the company (whereof the defendant was a member) and the plaintiffs, that the said bills should be renewed, that they were renewed, and that the bills in the declaration mentioned, drawn on the company by the plaintiffs, were accepted by the company, in lieu of and in satisfaction for the said bills, of which the plaintiffs were the indorsees and holders; and that the plaintiffs always, &c. had notice and knowledge of the premises. Replication de injuriâ: Held, upon special demurrer, that the plea was a plea containing matter of confession and excuse, and that the replication was good.—*Scott* v. *Chappelow*, 2 D. P. C. (N. S.) 78.

11. (*Indebitatus assumpsit, when maintainable.*) Where a contract had been made whereby the plaintiff agreed to pay for goods, supplied to him by the plaintiff, partly in other goods or partly in money: Held, that the plaintiff might recover the amount of the money (no evidence being given to show whether the defendant had delivered the goods or not) on an indebitatus count for goods sold and delivered, and need not declare specially on the contract. (3 B. & C. 420.)—*Bull* v. *Parker*, 2 D. P. C. (N. S.) 345.

12. (*Averment of identity of causes of action, when sufficient.*) To a declaration in debt, containing counts for work and labour, money paid, and on an account stated, the defendant pleaded to the first and last counts, that the monies in the said first and last counts are claimed by the plaintiff for and in respect of work done, &c. &c.; Held bad, on special demurrer, on the ground that the plea did not sufficiently allege the identity of the monies in the first and last counts, and

therefore contained no answer to the last count, which was primâ facie for a distinct cause of action.—*Rayner* v. *Wright*, 2 D. P. C. (N. S.) 418.

And see BILLS AND NOTES; COVENANT, 2, 3; SLANDER; VENDOR AND PURCHASER.

POOR-RATE.

1. (*Jurisdiction of justices as to—Mandamus—School—Beneficial occupation.*) A poor-rate was made for the township of K., on the 8th May, 1841; W., an occupier of land in the township, having refused payment of the rate, was summoned and appeared before the justices of K., on the 26th August, when a warrant of distress was refused. On the 21st September, the overseers obtained counsel's opinion on the question of W.'s liability. On the 18th September another rate was made, and on the 16th October W. was summoned before the justices of S. in respect of both rates; but the justices, being equally divided in opinion, gave no decision. A new demand was then made by the overseers of the second rate, and on the 29th December W. again appeared on a summons before the justices of K. in respect of that rate, but they again refused to issue their distress warrant: Held, that the overseers were not too late in applying for a mandamus in respect of both rates in Hil. T. 1842. Held, also, that the justices of S. being equally divided in opinion on the question of W.'s liability to the second rate, the overseers were entitled to take the case before the justices of K., and that the latter had jurisdiction to act.

A testator devised to the township of K. certain lands, for the maintenance of a sufficient schoolmaster for teaching children resident within the town and parish of K. free, and without any other stipend; and proceeded, "and it is further my desire that the town and parish of K. shall exempt, free, and discharge my said messuages, &c. in K., as aforesaid, of and from the payment of all leys, taxes, impositions and assessments:" Held, that the beneficial occupier of the devised premises was rateable to the poor; even though from 1713 to 1841 no assessment had been made on them, and in 1841 a resolution of vestry determined that they should be exempted.—*Reg.* v. *Ellis*, 2 D. P. C. (N. S.) 361.

2. (*Rateability of private box in theatre.*) By 10 Geo. 3, c. 75, poor-rates may be assessed for the parish of St. Martin, Westminster, "upon all and every person or persons who do or shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, wharf, warehouse, or any other buildings, tenement or hereditament, or any other person or persons who by law is or are chargeable to the relief of the poor:" Held, that the lessee for a term of years of a private box in Drury Lane theatre was rateable.—*Reg.* v. *Inhabitants of St Martin's in the Fields*, 2 G. & D. 426.

3. (*Beneficial occupation—Repairs of sea-wall.*) In 1621 one-third of certain lands in an island were conveyed to C., in consideration of his inclosing and defending the whole island against the overflowing of the Thames. The lands so conveyed are called "third acre lands," and the other lands the "free lands." By 32 Geo. 3, c. 31, for the more effectually embanking the island, commissioners were empowered to tax the owners and occupiers of "third acre lands" to their full amount, and if the sum raised therefrom should be insufficient, then to tax the "free lands." On appeal against a poor-rate, assessed upon an owner of a farm consisting of "third acre lands," the sessions granted a case, stating that the island formed part of several parishes, that the embankment tax raised from the appellant and other persons to whom "third acre lands" had passed, had for several years been equal to the rack rent or full annual value of those lands, that the appellant paid nothing for the purchase of the farm, and that the sum raised

from him for the current and preceding years was 123*l.* The case submitted to the Court the following question, "Whether the said sum of 123*l.* ought to be deducted from the assumed gross rental, in estimating the annual or rateable value of the farm, in assessing the appellant to the poor-rate?" Held, that there was a beneficial occupation by the appellant, and that the sum of 123*l.* ought not to be so deducted.—*Reg.* v. *Churchwardens, &c. of Vange*, 2 G. & D. 474.

PRACTICE.

1. (*Entering appearance for defendant.*) The Court allowed an appearance to be entered for the defendant upon the return of nulla bona only, and an affidavit of personal service of the distringas on the defendant.—*Ward* v. *Kirkman*, 4 Scott, N. R. 720.

2. (*Consolidation of actions.*) Five separate actions having been brought against five different individuals, upon five several guarantees given to secure distinct portions of the same debt, a judge at chambers made an order for consolidating them; the Court refused to rescind the order.—*Sharpe* v. *Lethbridge*, 4 Scott, N. R. 722.

3. (*Rule for judgment non obstante veredicto, form of.*)—A rule for judgment non obstante veredicto should (in the C. P.) be drawn up "upon reading the record," but *quære*, whether the officer's omission so to draw it up can be allowed to prejudice the party; at all events, the defect is cured by the circumstance of a copy of the pleadings being annexed to the affidavit upon which the rule was moved.—*Beaty* v. *Warren*, 4 Scott, N. R. 725.

4. (*Setting aside judgment on payment of costs.*) Where the defendant has obtained an order to set aside a judgment, *on payment of costs*, the Court will not relieve him from the condition; nor is he at liberty, after service to adandon the order and apply to the Court.—*Giraud* v. *Austen*, 4 Scott, N. R. 750.

5. (*Consolidating actions.*) Where three actions were brought against the principal and sureties on a replevin bond, the Court stayed the proceedings in two of them, the defendants therein undertaking to be bound by the decision in the other action.—*Bartlett* v. *Bartlett*, 4 Scott, N. R. 779.

6. (*Setting aside proceedings for irregularity, time for.*) Where judgment was irregularly signed, and execution levied, on the 9th of March, it was held too late to apply to set aside the judgment on the 28th of April following, either at the instance of the defendant himself, or of his assignees, he having subsequently become bankrupt; though the latter were not aware of the irregularity until the 7th of April.—*Weedon* v. *Garcia*, 2 D. P. C. (N. S.) 64.

7. (*New trial, when to be moved for.*) Where, after a trial of a cause had in term, a party seeks to obtain a new trial, his motion must be made within four days of the return day of the distringas, inclusive of the return day. Therefore, where a cause had been tried on Thursday, the 26th of May, and the distringas was returnable on the 27th, a motion on the following Wednesday, June 1st, was held too late.—*Chapman* v. *Eley*, 1 D. P. C. (N. S.) 93.

8. (*Judgment for want of a plea, when too soon.*) In a Middlesex cause, the time for pleading was out on the 30th of May. On that day the defendant obtained a rule to change the venue to Surrey, which was served at ten o'clock on the morning of the 31st, but delivered no plea. The plaintiff signed judgment for want of a plea on the same day: Held, that the judgment was signed too soon. —*Nichols* v. *Stockbridge*, 2 D. P. C. (N. S.) 96.

9. (*Service of rule.*) Service of a rule to compute, by putting it through the door of the chambers of the defendant's attorney, (there being a notice on the door to that effect), held sufficient.—*Warren* v. *Thompson*, 2 D. P. C. (N. S.) 224.

10. (*Same.*) Service at the defendant's house on a female whom the deponent states he *believes* to have authority to receive messages for the defendant, is insufficient.—*Brandon* v. *Edwards*, 2 D. P. C. (N. S.) 225.

11. (*Informality in jury process—Waiver—Amendment.*) A cause being at issue, notice of trial was given for the adjourned sittings in London, which commenced on the 14th of February; on Saturday, the 19th of February, the parties attended a summons before a judge, who made an order that the defendant should be allowed to amend his pleas, on condition that the plaintiff should be at liberty, absolutely, to go to trial on the following Monday, the 21st of February; the cause was tried on the 22nd of February, and the plaintiff recovered a verdict. After the jury were sworn, the defendant objected to the record for irregularity in the omission of the teste and the return of the venire and habeas corpora, and for an informality in the award of venire, but the objections being overruled, he subsequently obtained a writ of error upon the same grounds of objection. Held, upon motion to set aside the trial and verdict, first, that the application was against good faith; secondly, that the defendant had waived the objection by suing out the writ of error; and upon cross motion by the plaintiff for leave to amend the record, held also, that such amendment might be made, the objections being against good faith.—*Ouchterlony* v. *Gibson*, 2 D. P. C. (N. S.) 101.

12. (*Entering appearance for defendant.*) The Court has no power to allow a plaintiff to enter an appearance for a defendant, in a case where it only appears that a copy of the writ of summons has been left at the defendant's dwelling-house, and that the defendant has by his attorney admitted the receipt of it.—*Russell* v. *Lowe*, 2 D. P. C. (N. S.) 233.

13 (*Service of rule.*) Service of a rule to compute upon the daughter of the defendant's landlady at the house, in which the defendant was personally served with notice of declaration: Held sufficient. (1 D. P. C. (N. S.) 600.)—*Lawes* v. *Scales*, 2 D. P. C. (N. S.) 342.

14. (*Judgment as in case of nonsuit.*) In answer to a rule for judgment as in case of nonsuit, in a country cause, it was sworn by way of excuse, by the clerk to the London agent of the plaintiff's attorney, that he had been informed and verily believed that the plaintiff was not prepared with sufficient evidence to go to trial. The Court discharged the rule on a peremptory undertaking. (8 D. P. C. 18.)—*Farmer* v. *Cross*, 2 D. P. C. (N. S.) 387.

15. (*Same.*) In answer to a rule for judgment as in case of a nonsuit, the affidavit stated, that since issue joined the defendant had applied to the Insolvent Court for relief, and had filed his schedule, in which the plaintiff's debt was admitted. The Court discharged the rule with costs, although it was not sworn that the plaintiff was not aware of the defendant's being in an insolvent condition before the commencement of the action.—*Featherstone* v. *Bourne*, 2 D. P. C. (N. S.) 389.

16. (*Same.*) In a country cause, notice of trial having been given for the summer assizes, the defendant applied to the plaintiff, and expressed a wish to settle the action, and was supplied with the terms on which the plaintiff would agree to a settlement. Pending the negotiation the time of trial passed by. The

defendant having subsequently obtained a rule for judgment as in case of a nonsuit, the Court discharged it with costs, as having been obtained against good faith. (9 D. P. C. 326.)—*Foxbery* v. *Butler*, 2 D. P. C. (N. S.) 390.

17. (*Mistrial, motion on the ground of, time for.*) A motion to set aside proceedings on the ground of mistrial must be made within the four next days of term. *Cheese* v. *Scales*, 2 D. P. C. (N. S.) 438.

18. (*Application for speedy execution.*) In the Exchequer, if a cause be tried at the third sittings in term, and there be not four days remaining in the term after the return-day of the distringas, the plaintiff must apply for speedy execution, in order that he may not be delayed till the next term.—*Chapman* v. *Brown*, 1 C. & M. 463.

19. (*Right to begin at trial.*) Declaration on promisary notes by indorsee against drawer, containing counts on the notes only. The defendant pleaded as to part of the amount, payment of that sum while the payee was the holder of the notes; and as to the residue, payment of a further sum into Court, with a denial that the plaintiff had sustained any greater damages. Replication to the first plea, that the payment was not made while the payee was the holder; to the second, damages ultra: Held, that the plaintiff was entitled to begin.—*Cripps* v. *Wells*, 1 C. & M. 489.

PRACTICE IN CRIMINAL CASES.

(*Evidence in reply.*) A prisoner on his trial relied on matter of excuse wholly repugnant to his statement before the magistrate. That statement not having been given in evidence in the case for the prosecution, the Court would not allow it to be read in reply, to contradict the defence then set up.—*Reg.* v. *Powell*, 1 C. & M. 500.

PRINCIPAL AND AGENT.

(*Liability of principal for untrue representation of agent.*) In an action on the case for a fraudulent representation of the value of a house, on a sale of the lease of it by the defendant to the plaintiff, it appeared that the defendant employed his attorney to put it in a course of being sold by auction. He described it to the plaintiff as being let for 100*l.* a year, clear of all rates and taxes, while in truth the defendant was to pay all rates and taxes. The attorney made this statement bonâ fide believing it to be true; but the statement was not authorised by the defendant, nor had the defendant himself made any representation on the subject.

On this representation the plaintiff bought the house, paying a larger price than he would have done if he had known the fact that the defendant paid the rates and taxes. The Court of Queen's Bench held, that the plaintiff was entitled to recover the difference of value from the defendant, but their judgment has since been reversed on error in the Exchequer Chamber. (6 M. & W. 358.)—*Fuller* v. *Wilson*, 2 G. & D. 460.

PRINCIPAL AND SURETY. See BANKRUPTCY, 1.

PROCESS.

1. (*Succesive writs of ca. sa.—Scire facias, where necessary.*) If a writ of ca. sa. is set aside for irregularity the plaintiff is not bound to proceed by scire facias or action on the judgment, but may at once take the defendant again on a fresh writ of ca. sa. (1 C. M. & R. 525.)—*Merchant* v. *Frankis*, 2 G. & D. 473.

2. (*Indorsement on continuing writs to save the statute of limitations.*) The indorse-

ment on a second or subsequent writ of summons, issued under the 2 Will. 4, c. 39, s. 10, to save the statute of limitations, must contain a memorandum specifying the date, not only of the writ but of the *return.*—*Williams* v. *Williams*, 10 M. & W. 174; 2 D. P. C. (N. S.) 209.

3. (*Writ of summons—Description of defendant.*) Where a defendant was described in a writ of summons as "R. S.," of the city of London: Held, that the description was insufficient, although it was stated in the affidavits that some time before the issuing of the writ he had abandoned his house, and had no regular place of abode.

Semble, that he ought to have been described as of his late abode.—*Cotton* v. *Sawyer*, 10 M. & W. 328; 2 D. P. C. (N. S.) 310.

4. (*Return of ca. sa. for purpose of proceeding to outlawry.*) On an application to set aside a ca. sa. and subsequent proceedings to outlawry, on the ground that the writ had been made returnable immediately, in conformity with the provisions of the 3 & 4 Will. 4, c. 67, s. 2, instead of making it returnable on a day certain, with fifteen days between the teste and the return, the Court refused to decide the objection on motion, but left the party to bring his writ of error. (1 M. & W. 58.)—*Sandford* v. *Wyatt*, 2 D. P. C. (N. S.) 2.

5. (*Distringas against peer.*) The Court will not grant a writ of distringas to proceed to outlawry against a peer of parliament, but will grant such a writ to compel appearance.—*Taylor* v. *Lord Stuart de Rothsay*, 2 D. P. C. (N. S.) 181; see also *Snape* v. *Earl of Waldegrave*, id. 401.

6. (*Variance of fi. fa. from judgment—Staying proceedings.*) In an action of debt, the aggregate amount claimed in the declaration was 1500*l.*; the plaintiff signed judgment by default, and the entry in the Master's book denoted no sum as that for which judgment was entered, a writ of fi. fa. having been issued for 514*l.*, the defendant obtained a summons at chambers, to set aside the writ, on the ground that the judgment must be taken to be for 1500*l.*, and that there was, consequently, a variance; the first summons was not attended, and pending a second summons, the plaintiff made up and carried in the roll, taking judgment for 514*l.* only, and remitting 986*l.*, the writ of fi. fa. was, notwithstanding, set aside by an order of the learned judge, on the ground of variance: Held, that the order must be rescinded; for that when it was made, there was a regular judgment authorizing the writ of fi. fa.: Held, also, that the first summons did not operate as a stay of proceedings, so as to prevent the plaintiff from making up and carrying in the judgment roll; for, *semble*, that as the first summons is not a peremptory summons (Reg. Gen. T. T. 1 Will. 4, s. 9), but the order to attend, only becomes peremptory when a second summons is served; the stay of proceedings only accrues from the time at which the second summons is attendable.—*Phillips* v. *Birch*, 2 D. P. C. (N. S.) 97.

7. (*Distringas.*) In the Queen's Bench, a distringas will not be granted where two of the calls have been made on the same day, unless the second was in pursuance of an appointment *by the defendant.*—*Jamieson* v. *Wilkins*, 2 D. P. C. (N. S.) 331.

8. (*Distringas—Entering appearance.*) Where a distringas has been executed, and there is a return of nulla bonâ only, the plaintiff is entitled to an order to enter an appearance for the defendant.—*James* v. *Laurie*, 2 D. P. C. (N. S.) 334.

9. (*Distringas—Compelling affidavit of sheriff's officer.*) The Court will not grant any process or rule against a sheriff's officer, who, having been entrusted to serve a distringas to compel appearance, to which the sheriff has returned nulla bonâ and non est inventus, will not make an affidavit of the efforts he has made to serve the writ.—*Raymond* v. *Smith*, 2 D. P. C. (N. S.), 343.

10. (*Priority of writs.*) One attorney being employed by six several plaintiffs in various actions against one defendant, in each of which judgment was obtained and execution issued, all the writs were delivered to the sheriff for execution at the same time, and in one bundle. The Court refused, on application by the sheriff, to compel the plaintiffs or their attorney to direct in what order the writs should be executed.—*Ashworth* v. *Earl of Uxbridge*, 2 D. P. C. (N. S.) 377.

11. (*Indorsement on ca. sa. to levy poundage and fees.*) Though it is irregular to indorse a writ of ca. sa. to levy sheriff's poundage and officer's fees, the Court will not on that ground order a defendant to be discharged out of custody on the writ, it being otherwise valid and unsatisfied. Therefore, where on a rule obtained by a defendant for his discharge on this ground, it appeared that he had not paid or tendered the debt, the Court discharged the rule without costs. —*Pitcher* v. *Roberts*, 2 D. P. C. (N. S.) 394.

12. (*Successive writs of ca. sa.—Escape.*) Where the defendant had been arrested on a writ of ca. sa., at the suit of the plaintiff, but a voluntary escape was permitted by the sheriff, when the plaintiff sued for the escape, and recovered; but the plaintiff was subsequently arrested again on a second ca. sa., nominally at the suit of the plaintiff; but, in fact, as it was admitted, with a view to the indemnification of the sheriff, the Court ordered that writ to be set aside, and the defendant to be discharged out of custody.—*Gillott* v. *Aston*, 2 D. P. C. (N. S.) 413.

13. (*Jury process, when amended.*) The venire facias was tested 4th June, 1842, returnable immediate. The distringas juratores bore teste the 2d November, 1842, and commanded the sheriff to distrain the jurors, so that he might have their bodies before the barons, &c., on the 17th of June, unless the chief baron should first come on the 15th of June (the commencement of the sittings after term). The cause was tried on the 25th of June, and a verdict found for the plaintiff. A writ of error coram vobis having been sued out, the Court held that the error was a misprision of the clerk, and might be amended on motion. (Gilb. C. P. 177; 2 Ld. Raym. 1143; Rolle's Rep. 111; Barnes, 5.)—*Cheese* v. *Scales*, 2 D. P. C. (N. S.) 439.

And see JUDGMENT; PRACTICE, 1, 11, 18.

PROHIBITION.

(*Affidavits in, how to be entitled.*) Affidavits in support of an application for a writ of prohibition must be entitled simply in the Court, and not in any cause: therefore, affidavits produced on such a motion, entitled "In the Queen's Bench, between the Rev. B. G., clerk, party appellant, and M. E., party respondent," in prohibition, were rejected, there being no such cause in Court. And this objection being raised on showing cause against the rule, the Court discharged it, and refused to allow the affidavits to be resworn.—*Ex parte Evans*, 2 D. P. C. (N. S.), 410.

And see CHURCH RATE.

RAILWAY ACT.

1. (*Mandamus to railway company to purchase premises injured by their works.*) By sect. 46 of the London and Greenwich Railway Act (3 & 4 W. 4, c. xlvi.), if the company wish to buy any part of certain "properties" therein mentioned, they cannot compel a sale unless they buy the whole of such "properties."

By sect. 47, the owner of any "house, manufactory, ground, or building," within fifty feet of the railway, may call upon the company to purchase such "house, manufactory, ground, or building:" Held, that where a piece of ground taken under one lease, containing a principal dwelling-house and garden occupied by a manufacturer, a manufactory and smaller dwelling-houses in occupation of under-tenants, and the principal dwelling-house and garden only were within the fifty feet, and the company did not wish to buy any part of the property, the owner could not compel them to buy more than the dwelling-house, yard, and garden.—*Reg.* v. *The London and Greenwich Railway Company*, 2 G. & D. 444.

2. (*Construction of—Right to arch over public thoroughfares.*) The Northern and Eastern Railway Company were entitled, under their acts of parliament, the 6 & 7 Will. 4, c. ciii., and 2 & 3 Vict. c. lxxvii., to construct coverings or buildings by arches or otherwise over the public streets and thoroughfares, if it were necessary or reasonably convenient for the construction of their station, warehouses, &c. at Shoreditch, in like manner as they were entitled to do for the construction of the railway itself.—*Attorney-General* v. *Eastern Counties Railway Company*, 10 M. & W. 263.

3. (*Construction of—Compensation clauses—Liability of company for damage by obstruction of lights, &c.*—By a railway act, it was provided, that nothing in the act contained should authorize the company to take, injure, or damage, for the purposes of the act, any house or building which was erected on or before the 30th November, 1835, without the consent in writing of the owner or other person interested therein, other than such as were specified in the schedule to the act, unless the omission therefrom proceeded from mistake, &c.

A subsequent clause contained provisions for settling all differences which might arise between the company and the owners or occupiers of any lands which should be taken, used, damaged, or injuriously affected by the execution of any of the powers granted by the act, and for the payment of satisfaction or compensation, as well for damages already sustained, as for future temporary, or perpetual, or any recurring damages: Held, that the company were liable, in an action on the case, to the reversioner of a house erected before the 30th November, 1835, and not specified in the schedule, for damage done to it by the obstruction of its lights by a railway station erected by the company under the act, and by the dust, &c., drifted from the station and embankment into the house; and that the plaintiff was not bound to come in under the compensation clause.—*Turner* v. *Sheffield and Rotherham Railway Company*, 10 M. & W. 425.

4. (*Construction of—Action for calls.*) The 108th section of 6 & 7 Will. 4, c. cviii., (Thames Haven Dock and Railway Company's Act), provided that the business and the concerns of the company should be carried on under the management of twelve directors, to be chosen from amongst the proprietors holding ten shares each, to whom the general management and control of the business of the company was intrusted, and who were authorized to do all things necessary or expedient for carrying on the business and concerns of the company,

and to enforce, perform, and execute all powers, authorities, privileges, acts, and things in relation to the said company; section 112 provided, that when and so often as any director should die or resign, or become disqualified or incompetent to act as a director, it should be lawful for the remaining directors to elect some other proprietor duly qualified in his place: section 116 provided, that at all meetings of directors, five should be a quorum: section 123 enabled the company to sue for calls.

Where in an action under this act for calls, the defendant suffered judgment by default, and judgment was signed on the 8th of March, and on the 31st of May, in T. T., he applied to set that judgment aside, on the ground that at the time of the commencement of the suit, and during its continuance, the direction consisted of seven proprietors only instead of twelve, the Court refused to interfere, as well on the ground of the delay, and argued on demurrer, and because the objection was not clearly made out on the provisions of the act.

Held also, that the provisions of the 108th and 112th sections of the act, were directory only, and that the business of the company might be conducted by seven directors, unless the shareholders should interfere to require the completion of the whole number, but that at all events these provisions were intended for the internal management of the company only, and could not be taken advantage of by a person in the position of a stranger.—*Thames Haven Dock and Railway Company* v. *Rose*, 2 D. P. C. (N. S.) 104.

5. (*Action for calls—Proof of proprietorship.*) By the 96th section of 6 Will. 4, c. 37, (The Aylesbury Railway Act) the directors of the Aylesbury Railway Company are empowered to make calls from the subscribers and proprietors of the undertaking "for the time being," under certain conditions, and if any proprietor or owner for the time being of any shares shall neglect or refuse to pay his rateable proportion, they are authorized to sue for and recover the same, and to declare the shares belonging to such owner to be forfeited, and to order such shares to be sold: by the 98th section it is provided, that in an action brought by the company against any proprietor for the time being for any share for calls, it shall be sufficient for the company to allege and declare that the defendant being a proprietor, is indebted, &c. upon a share belonging to the defendant, without setting forth the special matter, and on the trial of such action, it shall only be necessary to prove that the defendant at the time of making such call was a proprietor of a share, &c., and the company shall thereupon be entitled to recover, and the production of the book (containing a list of shareholders) shall be primâ facie evidence that such defendant is a proprietor; by the 101st section, the proprietors of shares are authorized to dispose of and transfer their shares, and the company are required by their secretary to enter a memorial of such transfer in the books of the company, and to make an indorsement of such entry on the deed of sale and transfer, and of such transfer on the certificate of each share sold, and until such entry shall have been made, the seller shall remain liable for all future calls: by section 102, it is provided, that no proprietor shall sell or transfer any share upon which a call has been made, after the call has become payable, unless he shall have paid such call. In an action by the company to recover the amount of the call, the defendant pleaded, that after the call was made, and before it became payable, he transferred his shares to one C. T., and that a memorial of such transfer was duly entered according to the provisions of the act, and that thereby his liability had ceased. On demurrer to the plea, it was held, that

under the provisions above recited, the plea set up a good answer to the action, for that the defendant was not a proprietor for the time being, within the meaning of the act. (6 M. & W. 707.)—*Aylesbury Railway Company* v. *Mount*, 2 D. P. C. (N. S.) 143.

RAILWAY COMPANY.

(*Rights and liabilities of, as carriers.*) The Grand Junction Railway Company were authorized by their act of parliament, 3 & 4 Will. 4, c. xxxiv., s. 156, to carry and convey upon the railway all such passengers, goods, merchandize, &c., as should be offered to them for that purpose, and to make such *reasonable charges* for such carriage and conveyance as they might from time to time determine on. Section 159 authorized the company also to fix the sums to be charged in respect of small parcels not exceeding 500 lbs. weight each. By the 4 W. 4, c. iv., s. 19, they were empowered to carry passengers and goods on other railways, and to make such reasonable charges for such carriage as they should determine on. And by another act, the 3 Vict. c. xlix., s. 26, it was enacted, that the charges by the former acts authorized to be made for the carriage of passengers or goods should be at all times charged *equally* and after the same rate in respect of all passengers, goods, &c., conveyed or propelled by a like carriage or engine, passing on the same portion of the line and under the same circumstances.

The company published a list of rates for the carriage of merchandize, divided into seven classes, of which the lowest was 16*s.* and the highest 60*s.* per ton: and for "boxes, bales, hampers, or other packages, when they contained parcels or other packages or things under 112 lbs. weight each, directed, consigned, or intended for different persons, or for more than one person," they imposed a charge of 1*d.* per lb. weight: Held, that this last was not a *reasonable* charge, in the case of a package above 500 lbs. weight, made up by a carrier and directed to one person, although containing a number of parcels under 112 lbs. weight each, consigned or directed to different persons.

The company also became carriers on the London and Birmingham line, and published a list of charges for the carriage of goods from Manchester to London, among which "Manchester packs" were charged 3*s.* 3*d.* per cwt., or 65*s.* per ton. At the foot of this list was a notice, that "goods were brought to the station at Camden Town without extra charge," and that there was "no charge for booking or delivery in London." The company made an agreement with C. and H., that the latter should carry from the station at Camden Town and deliver in London all such goods carried by the railway, and for so doing should receive 10*s.* per ton out of the entire charge of 65*s.* per ton: Held, that, under these circumstances, the charge of 65*s.* per ton, when made to any other persons who were ready to receive their goods at the station at Camden Town, was both *unreasonable* and *unequal*.—*Pickford* v. *Grand Junction Railway Company*, 10 M. & W. 399.

SETTLEMENT.

(*By apprenticeship to the sea service—Operation of* 4 & 5 *W.* 4, *c.* 76, *s.* 67.) An apprentice in the sea service, whose term of apprenticeship was running at the time of the passing of 4 & 5 W. 4, c. 76, but who had previously served and resided so as to gain a settlement, retains his settlement, notwithstanding the 67th section, which enacts, "that from and after the passing of this act, no settlement shall be required by being apprenticed in the sea service, or to a

householder exercising the trade of the seas as a fisherman or otherwise, nor by any person now being such an apprentice, in respect of such apprenticeship." —*Reg.* v. *Inhabitants of St. Giles*, 2 G. & D. 542.

SHERIFF.

1. (*Right to levy for fees—Return.*) A sheriff may levy under a fi. fa. the amount of his fees, authorized by the 7 W. 4 and 1 Vict. c. 55, although not indorsed on the writ, and he need not particularize their respective amounts in his return.—*Curtis* v. *Mayne*, 2 D. P. C. (N. S.) 37.

2. (*Attachment for not returning writ.*) A sheriff is not liable to an attachment for not returning a writ which has not been transferred to him by his predecessor in office, notwithstanding the provisions of the 3 & 4 W. 4, c. 99, s. 7.—*Thomas* v. *Newnam*, 2 D. P. C. (N. S.) 33.

3. (*Special return, when sufficient.*) The sheriff returned to a writ of fi. fa. that he had seized certain goods, which were claimed by a third party, and he therefore applied to the Court under the Interpleader Act, and an order was made for the trial of an issue, whether the goods were the property of the claimant; and that afterwards the plaintiff directed him to deliver up possession of the goods to the claimaut: Held insufficient.—*Cleaver* v. *Fisher*, 2 D. P. C. (N. S.) 292.

And see PROCESS, 11, 12.

SLANDER.

(*Plea in, when too general.*) To a declaration for words, imputing to the plaintiff, a pawnbroker, that he had committed the unfair and dishonourable practice of duffing, that is, of replenishing or doing up goods, being in his hands in a damaged or worn-out condition, and pledging them with other pawnbrokers, the defendant pleaded, that the plaintiff did replenish and do up divers goods, being in his hands in a damaged or worn-out condition, and pledge them with divers other pawnbrokers: Held bad on special demurrer, as not being sufficiently specific. (1 T. R. 748; 2 Chit. Rep. 665; 1 Taunt. 543.)—*Hickinbotham* v. *Leach*, 10 M. & W. 361; 2 D. P. C. (N.S.) 270.

STAMP.

1. (*Unstamped document, when admissible for collateral purpose.*) On an issue to try the property in certain goods, which the plaintiff claimed under a bill of sale, a former bill of sale of the same goods, but which had been cancelled, was tendered in evidence to show that the second bill of sale was given bonâ fide, and not fraudulently. This document having been rejected at the trial, on the ground that it was not stamped, Held, that it was properly rejected, and was inadmissible without a stamp.—*Williams* v. *Gerry*, 10 M. & W. 296; 2 D. P. C. (N. S.) 201.

2. (*Unstamped part of agreement, when admissible.*) If the plaintiffs put in one part of a written agreement, which is signed by the defendant only, and is duly stamped, the defendant may put in the other part, which is signed by one of the plaintiffs "for self, and the other executors," although that part be not stamped.—*Turner* v. *Hardey*, 1 C. & M. 449.

STOPPAGE IN TRANSITU.

(*Transitus, when determined—Rescission of contract by.*) H. and Co., of Hull, having sold to W., of Mickley Mills, near Leeds, twenty mats of flax, they were, on the 10th of August, sent by railway to Leeds, and arrived at the de-

fendants' warehouse at Leeds, where it was the custom for the defendants to receive goods sent for W., and to give him notice of their arrival, and for him to send his carts for them. On the 16th of August, W. sent his cart and took away ten of the mats. On the 18th of August, H. and Co. sold to W. twenty other mats of flax, and a quantity of other goods. The flax was sent by railway to Leeds, and arrived duly at the defendants' warehouse; the other goods were sent by sloop to Boroughbridge. On the arrival of this flax at the defendants' warehouse, notice was given to W. by letter, which stated that unless the goods were sent for, they would remain there at warehouse rents. On the 23d of August, W. sent his cart and took away ten of the latter mats, and left there ten of the mats last sent, and ten of the former. On the 8th of September, W. having become insolvent, the goods which had been shipped for Boroughbridge were stopped in transitu at Hull; and on the same day the ten mats of flax of the second parcel were also stopped at Leeds by H. and Co. On the 11th of September the sheriff entered, and seized all the flax in the defendants' warehouse sent by H. and Co., under an execution against W. On the 15th of September there was also a stoppage by H. and Co. of the remaining ten mats of the first parcel. It was found by the jury at the trial, that the parties contemplated that the goods were to be used for the purpose of manufacture at Mickley Mills: Held, under the above circumstances, that the transitus was at an end on the arrival of the goods at the defendants' warehouse.

Held, also, that the stoppage of the goods which had been shipped to go to Boroughbridge had not the effect of revesting the property in the parcel of flax which had been sent to the defendants' warehouse at Leeds, although comprised in one joint contract with the other goods.

Semble, (Lord Abinger, C. B., dissentiente,) that the effect of a stoppage in transitu is not to rescind the contract, but only to replace the vendor in the same position as if he had not parted with the possession of the goods.

Held, that, at all events, the vendor had no right to retake that part which had arrived at its journey's end.—*Wentworth* v. *Outhwaite*, 10 M. & W. 436.

TENDER.

(*When conditional.*) An agent of the defendant went to the plaintiff and offered him 4*l.* "in full discharge of his account;" the plaintiff refused it on the ground that the sum was not sufficient, but made no objection as to the terms of the offer: Held, that the tender was good. (1 Ad. & E. (N. S.), 409; 8 M. & W. 298.)—*Bull* v. *Parker*, 2 D. P. C. (N. S.), 345.

TRESPASS. See CORPORATION.

TROVER.

(*Evidence of conversion.*) A bailiff seized the goods of the plaintiff under a fi. fa. against a third person, and deposited them in an outbuilding of an inn, with the assent of the innkeeper.

The innkeeper's wife assisted him in the management of his business. On a demand being made to her to deliver up the goods, she said she had seen the attorney of the plaintiff in the original suit, that he told her not to bother herself about them, he would see her harmless, and that she would not give them up: Held, in an action of trover against the innkeeper and wife, in which was alleged a conversion by her to her husband's use, that this refusal was evidence of a conversion by her.—*Catteral* v. *Kenyon*, 2 G. & D. 545.

TRUSTEE. See BOND.

TURNPIKE TOLLS.

The stat. 3 & 4 Vict. c. 33, is merely a declaratory act, and does not create any new exemption from toll.

In an action of debt by the trustee of a turnpike road against a lessee of tolls, the defendant pleaded, that, after the time of the demise to him, and before any rent became due, the stat. 3 & 4 Vict. c. 33, was passed, which took away certain of the tolls, and therefore the lease was void: Held bad on general demurrer.—*Harris* v. *Morrice*, 10 M. & W. 260.

VAGRANT ACT.

(*Desertion of child.*) The 5 Geo. 4, c. 83, which makes it an act of vagrancy in a parent to desert his child, applies to *legitimate* children only. (2 Bulstr. 346.)—*Reg.* v. *Maude*, 2 D. P. C. (N. S.), 58.

VENDOR AND PURCHASER.

(*Action by vendor of land for purchase money, what averments necessary in.*) Assumpsit. The declaration alleged, that by an agreement made between the plaintiff and the defendant, the plaintiff agreed to sell, and the defendant to buy, certain building ground for the sum of 120*l.*, which the defendant agreed to pay the plaintiff on or before the expiration of four years, with interest at 5*l.* per cent. half-yearly until paid; and it averred that the four years had not expired; that the 120*l.* had not been paid; and that 12*l.* had become due for interest: Held, that the declaration was good, and that the plaintiff was not bound to aver that he had delivered possession of the land, or that he had title to the land, or was ready and willing to convey it.—*Wilks* v. *Smith*, 10 M. & W. 355; 2 D. P. C. (N. S.), 215.

WARRANT OF ATTORNEY.

1. (*Judgment on old warrant of attorney.*) The Court will not allow judgment to be signed on a warrant of attorney against a defendant who is abroad, and has not been seen for three weeks, unless it is sworn that "it is believed he is still alive."—*Richardson* v. *Scholefield*, 2 D. P. C. (N. S.), 35.

2. (*Attestation of.*) An attorney acting on the behalf of the plaintiff cannot validly attest the execution of a warrant of attorney under 1 & 2 Vict. c. 110, s. 9, although named by the defendant himself, who knows him to be the plaintiff's attorney.

The application may be made at the instance of the defendant's assignees; and as the warrant is a nullity, delay is immaterial, in applying to set aside a judgment and execution signed and issued thereon. (5 M. & W. 513; 6 M. & W. 98.)—*Cocks* v. *Edwards*, 2 D. P. C. (N. S.), 55.

3. (*Judgment on, in vacation.*) A warrant of attorney authorised the plaintiff to sign judgment "as of" a term: he signed judgment (under the rule of H. T., 4 Will. 4, s. 3) in vacation, and in the manner directed by that rule. Having taken no proceeding on the judgment, except that of suing out a fi. fa., which however had not been executed, the Court, on the plaintiff's application, granted him a rule absolute in the first instance for setting aside the judgment. —*Coulson* v. *Clutterbuck*, 2 D. P. C. (N. S.), 391.

4. (*Judgment on—Attesting witness.*) Where the attesting witness to a warrant of

attorney had been transported seven years before an application to sign judgment, and no information could be obtained about him, the Court allowed judgment to be signed on the production of an affidavit of his and of the defendant's handwriting.—*Edwards* v. *Penhey*, 2 D. P. C. (N. S.), 425.

WARRANTY. See CONTRACT OF SALE, 1.

WITNESS.

1. (*Competency of next of kin.*) The widow of a person who has died intestate is not a competent witness, in an action brought against a person (who has got possession of the intestate's goods) as executor de son tort, for a debt due from the estate, to prove the due execution of a bill of sale of his goods by the intestate to the defendant.

   It is not too late to object to the competency of a witness after he has been sworn in chief, but before he has been asked any question on oath.—*Yardley* v. *Arnold*, 10 M. & W. 141; 2 D. P. C. (N. S.), 311.

2. (*Incompetency from interest.*) The plaintiff, having been employed by the defendant to do certain work for him, employed C. to assist him in doing the work, upon the terms that when the plaintiff earned 1*l.*, C. was to have 8*s.* and the plaintiff 12*s.*, and which sum C. was to be paid whether the plaintiff was paid or not, and for which he swore that he looked only to the plaintiff for payment: Held, in an action brought by the plaintiff to recover the price of the work, that C. was rendered a competent witness for the plaintiff, by indorsing his name on the record under 3 & 4 Will. 4, c. 42, s. 26.—*Carr* v. *Adams*, 10 M. & W. 282; 2 D. P. C. (N. S.), 279.

3. (*Examination of witnesses in India.*) In an information at the suit of the crown, the Court will grant a rule for a mandamus to examine witnesses in India, on the statement of the attorney-general that the writ is necessary, and will not require the production of any affidavit in support of that statement.—*Reg.* v. *Douglas*, 2 D. P. C. (N. S.), 416.

4. (*Competency of bankrupt.*) In an action by assignees of a bankrupt for a debt due to the estate, the bankrupt was called to negative payment of the debt to himself before his bankruptcy: Held, that he was competent, and that he might prove by parol that he had released the surplus of his estate, without producing or proving any deed of release.—(10 Ad. & E. 606.)—*Lucas* v. *Eades*, 2 D. P. C. (N. S.), 424.

5. (*Subpœna duces tecum—Lien.*) A judge at nisi prius will not compel a witness to produce a document under a subpœna duces tecum, if, as against the party asking for its production, the witness has a lien on the document.—*Kemp* v. *King*, 1 C. & M. 396.

WRIT OF TRIAL.

1. (*Under-sheriff's notes.*) An under-sheriff, sending his notes to the Court, on motion for a new trial, on the ground of misdirection, should state the manner in which he submitted the case to the jury, and not leave it to be shown by affidavit.—*Ralph* v. *Harvey*, 1 Ad. & E. (N. S.), 845.

2. (*When set aside for informality.*) Where the day of the teste was left blank in a writ of trial, and the writ was ordered to be returned immediately, instead

of on a day certain, as required by the 3 & 4 Will. 4, c. 42, s. 17; but the defendant had appeared at the trial, and went to the jury without raising any objection, the Court refused afterwards to set aside the writ. (4 Scott, 286; 3 M. & W. 169.)—*Masters* v. *Davy*, 2 D. P. C. (N. S.), 340.

3. A cause was tried before the under-sheriff, and the trial having begun late on the return-day of the writ of trial, the jury did not deliver their verdict until after one o'clock on the morning of the next day. The under-sheriff indorsed on the writ that the trial had taken place on the day it commenced. The plaintiff having brought a writ of error, the Court refused to direct the under-sheriff to indorse on the writ of trial a statement of the facts as they occurred.—*Pinkney* v. *Booth*, 2 D. P. C. (N. S.), 421.

EQUITY.

[Containing Cases in 1 Turner and Phillips, Part 1; 4 Beavan, Part 2; 11 Simons, Part 3; 1 Younge and Collyer, Parts 3 and 4.]

ACCOUNT.

1. (*Estoppel by admission at law.*) Pending a suit for an account and perpetual injunction, an action was brought by the plaintiff to establish his right at law, and the bill was retained to await the result of the action. In that action the defendant paid into Court 25*l.*, as compensation for part of the damage done; and the verdict allowed that sum only for the damage in question; and the plaintiff received that sum. But it appearing that the question at law was as to the right, and not the amount of damage done, it was held that the plaintiff was still entitled to an account in equity, refunding the 25*l.*, which the Court said he ought not to have received.—*Thomas* v. *Jones*, 1 Y. & C. 310.

2. (*Opening—Statement of errors by reference.*) In a bill for an account, the plaintiffs, in general terms, charged errors in the accounts between him and the defendant, and stated that they appeared in a certain report of an accountant; but the bill did not state the report, or specifically point out the errors: Held, that the plaintiff could not, on this record, give evidence of the report, or of such errors; and that, notwithstanding the defendant had stated the report in his cross bill, and had explained some of the errors.—*Shepherd* v. *Morris*, 4 B. 252.

And see PLEADING, 2.

ACCUMULATION. See COMPUTATION OF TIME.

ADMINISTRATION. See ECCLESIASTICAL COURTS.

ADMINISTRATION OF ASSETS.

1. (*Concurrent suits—Costs.*) Where pending an administration suit, a distinct suit is instituted by legatees for payment of their legacy, the executors ought to apply to stay proceedings in the latter suit; and they, having failed to do so in this case, the costs in the second suit, up to the coming in of the last answer, were made costs in the first suit; but the subsequent costs were thrown upon the legacies of plaintiffs in second suit.—*Therry* v. *Henderson*, 1 Y. & C. 481.

2. (*Concurrent suits.*) Two decrees had been made for the administration of the estate of A. B., deceased, one in a creditor's suit, and the other in a legatee's suit. A motion, by the plaintiff in the former, to stay the prosecution of the decree in the latter, so far as it directed an account of the deceased's estate and of his debts, was refused, there being no suggestion of a deficiency of assets.—*Plunkett* v. *Lewis*, 11 S. 379.

3. (*Declaration of rights without account.*) If the executors and trustees of a will file a bill for the purpose of having the rights of the defendants in the residue

ascertained, without either praying that the accounts of the personal estate may be taken, or offering to account for it, but admitting that there is a residue, the Court will declare the rights of the defendants in the residue, without directing the account of the personal estate to be taken, although the defendants apply, at the hearing, to have the accounts taken.—*Blathwayt* v. *Taylor*, 11 S. 455.

4. (*Indemnity to executor—Leaseholds.*) Leasehold estates of a testator were sold under a decree for carrying the trusts of the will into execution. The executor and trustee of the will had never been in possession of the estates: Held, nevertheless, that he was entitled to be indemnified in respect of the rents and covenants.—*Cochrane* v. *Robinson*, 11 S. 378.

5. (*Parties—Receivers.*) A person appointed by the will receiver of the testator's real estates, with a salary, is a proper party to an administration suit.—*Consett* v. *Bell*, 1 Y. & C. 569.

6. (*Payment of mortgage.*) Decreed on the authority of Scott v. Beecher, 5 Mad. 96; Lord Ilchester v. Lord Carnarvon, 1 Bea. 209; Evans v. Smithson (unreported), but against the opinion of the Court, that in administering the estate of the executor and devisee of a mortgagor, whose personal estate was not deficient, the mortgaged estate was primarily liable to the debt.—*Clarendon* v. *Barham*, 1 Y. & C. 688.

And see VOLUNTARY DEED.

ADMINISTRATION SUIT.

(*Suit by heir of mortgagor.*) In a suit for redemption by the heir of a mortgagor against the assignee of the mortgagee, who was also the personal representative of the mortgagor, the Court, besides the usual decree for redemption, declared the plaintiff entitled to have the balance which should be found due from him, and paid by him to the defendant as mortgagee, repaid to him out of personal estate of the mortgagor in a due course of administration, and decreed accordingly, the bill being properly framed with a view to such relief.—*Lloyd* v. *Wait*, 1 T. & P. 61.

AGREEMENT. See SPECIFIC PERFORMANCE, 4.

APPEAL.

(*Practice—Revivor.*) Where one of several defendants died pending their joint appeal to the House of Lords, and the House of Lords having admitted his representatives, on their petition, as parties to the appeal, eventually made an order varying the decree below, and dismissing the bill as against that defendant with costs: Held, that that order might be made an order of the Court below, without first reviving the suit.—*Thorpe* v. *Mattingley*, 1 T. & P. 200.

APPOINTMENT.

(*Parent and child—Fraud.*) A mother having an exclusive power of appointment among her children, subject to her own life interest, appointed the whole of the fund to one child, and then assigned her interest to such child, such child being then living with her, and no marriage or other establishment of the child being in contemplation: one of the trustees having refused to transfer the fund at the direction of the appointee, was ordered to do so in a suit brought for that purpose, and was refused his costs; but no costs were given against him. —*Campbell* v. *Horne*, 1 Y. & C. 664.

BANKRUPT.

(*Lien on purchase by uncertificated bankrupt.*) The lien founded on advances to an

uncertificated bankrupt for the purchase of a lease, and the contemporaneous deposit of such lease, which had been held the ground of a previous injunction by the Vice-Chancellor and the Lord Chancellor on appeal, finally established at the hearing. (Meux v. Smith, 11 S. 410.)—See *S. C.* 1 Mont. D. & D. L. M. No. 53.)

And see INJUNCTION, 2; PRACTICE, 5; and SPECIAL CASES (at the end.)

BREACH OF TRUST.

(*Notice of settlement—Debtor.*) Where a bond debt, which was made the subject of settlement, was afterwards paid (contrary to the terms of that settlement) to the husband, by the direction of the obligees of the bond, and the debtor had notice of the existence of such settlement, and had been present as a relation of the wife when it was read over; but the settlement did not in express terms refer to this bond, but stated the amount of the debt to have been paid by the wife to the trustees of the settlement: it was held, that the debtor was not liable to pay the money over again.—*Rose* v. *Clarke*, 1 Y. & C. 534.

BURIAL. See WILL, 31.

CHARGE.

1. (*Extinguishment—Presumption.*) Where a person, entitled to some charges on an estate, one of them, the prior charge of all, came into possession of that estate as devisee in fee, it was held, in the absence of other circumstances, a ground for presuming against the extinguishment of the charges, that the estate, being liable to the specialty debts of the devisor, (though it turned out, in fact, that the personal estate was sufficient for payment of such debts,) it was probably the interest of the devisee to keep up a charge which had priority over those debts.—*Earl of Clarendon* v. *Barham*, 1 Y. & C. 688.

2. (*Interest—Possession of estate subject to charges.*) Where the devisee of an estate, subject to charges, some of them for his own benefit, took possession of such estate, paying interest upon the charges, which were for the benefit of other parties, it was held, on a question arising between his heir and next of kin, that he was in possession as owner, and that the suplus of the rents were not to be applied in reduction of the capital of the charges.—*S. C.*

CHARITY.

1. (*Attempted extension by founder.*) By letters-patent, E. A. was empowered to found a charity, consisting of a master and a specified number of other members, who were thereby created a corporation, with power to take certain lands. E. A. was empowered to make ordinances for the government thereof, and for the better ordering of the estates. E. A. established the charity, and conveyed the lands to the use of the master and other members, of the numbers specified by the letters-patent, and to no other intent and purpose whatsoever. He afterwards made ordinances whereby, amongst other things, he added to the number of members specified by the letters-patent; and appropriated to them a portion of the revenues of the charity property: Held, that E. A. had not the power of creating additional members, or of declaring any trust of the property in their favour.—*Attorney-General* v. *Dulwich College*, 4 B. 255.

2. (*Costs of brief to attorney-general.*) Held that the costs of a brief and fee to the attorney-general (who did not attend at the hearing) ought to have been included in the taxation of the costs as between party and party, to be paid by the defendants.—*Attorney-General* v. *The Drapers' Company*, 4 B. 305.

3. (*Costs of relator—Charges and expenses.*) As a *general* rule, the relator in a successful information is entitled to his costs as between solicitor and client, the extra costs to be paid out of the charity property; but it is only in *special* cases that he would be allowed his charges and expenses.—*Attorney-General* v. *Kerr*, 4 B. 297.

4. (*General gift for benefit of place.*) Testator gave the residue of his property "to the government of Bengal, to be applied to charitable, beneficial, and public works, at and in the city of Dacca in Bengal, for the exclusive benefit of the native inhabitants, in such manner as they and the government might regard as most conducive to that end:" Held, that this was good as a charitable bequest for the benefit of the native inhabitants, and that the funds were to be held by the governor-general as trustee in his individual capacity.—*Mitford* v. *Reynolds*, 1 T. & P. 185.

5. (*Information and bill.*) Where an information and bill were filed to set aside an old lease of lands, vested in the Coopers' Company for charitable purposes, the plaintiffs being three of the governing body of the company, and two of the almsmen of the charity, the Court considering that the three first, at any rate, had no such individual interest as entitled them to appear as plaintiffs, dismissed the bill and information, giving leave to amend, so as to make it an information only.—*Attorney-General* v. *East India Company*, 11 S. 380.

6. (*Jurisdiction of visitor—Internal abuse.*) An information alleging, among other things, abuses in the treatment of twelve poor scholars, part of the foundation, held to be not sustainable on that ground, as the visitor was competent to redress the grievance.

N.B. This was a case of an *ex officio* information under 2 Will. 4, c. 57.—*Attorney-General* v. *Dulwich College*, 4 B. 255.

7. (*Jurisdiction on petition, 2 Will. 4, c. 57.*) Reference, on the petition of the attorney-general, made under the 2 Will. 4, c. 57, to appoint new trustees of a charity, to settle a scheme, and to ascertain the property, and in whom the legal estate was vested.—*In re Fowey Charities*, 4 B. 225.

And see Costs, 4; Notice.

CLERGYMAN.

(*Disability from trading.*) Receiver of a brewery granted, on the application of a spiritual person, who was a dormant partner therein.—*Hale* v. *Hale*, 4 B. 369.

CLERK OF RECORDS AND WRITS.

(*General rule as to business of new office—Office copy of bill.*) The business that used to be done in the Six Clerks' Office, and which is by the 5 & 6 Vict. c. 103, transferred to the clerk of records and writs, is under that statute, as followed up by the 3d order of the 26th October, 1842, subject, in the particulars stated in that order, to the same rules as formerly. Accordingly, the clerk of records and writs is not compellable to file the answer of a defendant, who has refused to take an office copy of the bill.—*Aked* v. *Aked*, 11 S. 437.

COMPUTATION OF TIME.

(*Commencement of term.*) A testator directed the income of his property to be accumulated for the term of twenty-one years *from* his death. The testator died on the 5th of January, 1820: Held, that in the computation of the term, the day of his death was to be excluded; and, consequently, that the dividends

on stock, which became due on the 5th of January, 1841, were subject to the trust for accumulation.—*Gorst* v. *Lowndes*, 11 S. 434.

And see PRACTICE, 7, 12.

CONSTRUCTION OF STATUTES. See CLERK OF RECORDS AND WRITS; PRACTICE, 15; PROTECTION OF SETTLEMENT.

COSTS.

1. (*Co-heiresses—Separate answer.*) The two co-heiresses of a trustee, who lived at a distance from each other, were made parties to a suit for enforcing the performance of marriage articles. They submitted to act as the Court might direct, and defended separately: Held, they were entitled to two sets of costs. —*Aldridge* v. *Westbrook*, 4 B. 212.

2. (*Evidence—Bill and cross bill.*) Evidence taken in the cross suit was read in both suits; both suits being dismissed with costs: Held, that the costs of the evidence were costs in the suit in which taken.—*Corporation of Arundel* v. *Holmes*, 4 B. 326.

3. (*Rehearing.*) A rehearing as to "costs, charges, and expenses," allowed in a case where the first order was made without the attention of the Court being called to the points, one of the points being as to what fund was liable.—*Attorney-General* v. *Kerr*, 4 B. 297.

4. (*Repartition of costs—Charity.*) As a general rule, the costs of an information relating only to a distinct portion of the estates belonging to a charity will be paid out of that portion; but in some cases they will be paid out of the whole property.—*S. C.*

5. (*Suit improperly framed.*) Extra costs occasioned by infant being made defendant, who ought to have been made a plaintiff, not allowed.—*Hoskins* v. *Nicholls*, 1 Y. & C. 478.

6. (*Unnecessary defence—Plea.*) Where the eventual defence of a party was the statute of limitations, which he relied on by answer, also contesting the original liability and the title of the plaintiffs, the bill was dismissed, but without costs, on the ground that he ought to have made defence by plea.—*Sanders* v. *Benson*, 4 B. 350.

And see APPOINTMENT; CHARITY, 3; MORTGAGE, 1; PRACTICE, 36, 40; TRUSTEE, 3.

COUNSEL. See FEES TO COUNSEL.

DEBTOR AND CREDITOR.

(*Debt made subject to trust—Rights of cestui que trust.*) The equitable owner of a debt is not, as such only, entitled to sue the debtor for payment in equity.—*Rose* v. *Clarke*, 1 Y. & C. 534.

DEED. See HUSBAND AND WIFE, 1.

DELIVERY UP OF DEEDS. See MUNICIPAL CORPORATION ACT.

DISCOVERY. See PLEADING, 1, 2; PRACTICE, 13.

DISSENTERS.

(*Trust—Change of character.*) A lease of a meeting-house was granted, in trust for a congregation of Protestant dissenters, who then met in a house belonging to J. A., in the town of S. The congregation was then in connection with the Secession Church of *Scotland*; and, consequently, professed the same doctrines,

and adopted the same form of worship, government, and discipline, as that church. Some years afterwards the minister and a large majority of the congregation separated from that connection, and joined another religious body, which professed the same doctrines, and used the same form of worship, but not the same form of government and discipline as the Secession Church: they, however, retained possession of the meeting-house: Held that, on their separation, they ceased to be objects of the trust; and, therefore, were not entitled to keep possession of the meeting-house.—*Broom* v. *Summers*, 11 S. 353.

EAST INDIES.

(*Mortmain.*) The Mortmain Act does not apply to the East Indies.—*Mitford* v. *Reynolds*, 1 T. & P. 185.

ECCLESIASTICAL COURTS.

(*Judgment as to next of kin not conclusive.*) The grant of letters of administration, though in a contested suit, is not conclusive upon the question of who is the next of kin.—*Barrs* v. *Jackson*, 1 Y. & C. 585.

ESTOPPEL. See ACCOUNT, 1; POWER, 1.

EVIDENCE.

1. (*Competency—3 & 4 Will. 4, c. 42.*) The 26th section of the 3 & 4 Will. 4, c. 42, by which witnesses, who were before incompetent by reason that the verdict or judgment in the pending action might be used as evidence for or against them in another proceeding, were rendered competent by enacting that such verdict or judgment should not be so used, applies to courts of equity as well as to courts of law.—*Oliver* v. *Latham*, 1 T. & P. 163.

2. (*Pedigree—Identity—Residence.*) An entry in an old account of burial fees, received by a sexton of a large parish, by which he charged himself with the receipt of a certain sum for the burial of one *Joseph Lloyd*, described as "in *Wells Street*," admitted as evidence that a person of that name, who was proved by the parish register of burials to have been buried there on the day on which the entry bore date, resided in *Wells Street*.—*Lloyd* v. *Wait*, 1 T. & P. 61.

And see PRACTICE, 16, 17; STAMP; WILL, 6.

FEES TO COUNSEL.

Observations on the practice of counsel receiving money on account of fees generally, and not for stated fees for specific matters.—*Re Smith*, 4 B. 309.

FINES AND RECOVERIES.

See observations of Lord Cottenham as to the principles on which fictitious conveyances operate.—*Wood* v. *Lambirth*, 1 T. & P. 8.

FRAME OF SUIT. See ADMINISTRATION SUIT.

FRAUD. See JOINT STOCK COMPANY, 1.

FREE BENCH.

(*Surrender by wife.*) A surrender by the wife of a copyholder, with his consent, and after having been separately examined, to the use of a purchaser from the assignees of the husband, who had become bankrupt, held effectual to bar her right of free bench, if any such existed by special custom, although at the time of such surrender, the purchase not having been completed, the purchaser had not any legal estate in the premises.—*Wood* v. *Lambirth*, 1 T. & P. 8.

And see WILL, 6.

GAMING.

(*Money lent for the purpose of play.*) Money lent in a foreign country for the purpose of playing at games, which are not illegal in such country, may be recovered in the Courts of this country; and *semble* also, that money won at play in such a country at games, or at a rate of play not illegal there, may also be recovered here. So held on appeal, reversing order of Vice-Chancellor of England.—*Quarrier* v. *Colston*, 1 T. & P. 147.

GUARDIAN. See INFANT, 1.

HEIR AT LAW. See MORTGAGE, 2.

HUSBAND AND WIFE.

1. (*Charge on wife's property.*) Where a wife was a party to and executed a deed, charging her separate property with payment of annuity, but did not join in the operative part or the covenants: Held, that there was no charge. —*Tullett* v. *Armstrong*, 4 B. 319.

2. (*Executors and administrators.*) Where property of the wife was, on the marriage, settled upon certain trusts for the benefit of the children, with power of appointment to her, in default of children, and in default of appointment, then to be paid to her *executors or administrators*, it was held, reversing the decision of the Vice-Chancellor of England, that the surviving husband was not excluded.—*Daniel* v. *Dudley*, 1 T. & P. 1.

3. (*Separation—Covenant to indemnify husband.*) It is not essential to the validity of a separation deed, that there should be a covenant by trustees of the wife to indemnify the husband against the debts of the wife; but a deed without such a covenant may take effect as a voluntary deed against the estate of deceased husband. In this case there was a trustee of the deed, but the covenant to indemnify was by the wife, and the Court treated the covenant as a nullity.—*Frampton* v. *Frampton*, 4 B. 287.

4. (*Wife's chose in action.*) A woman being entitled to two sums, one secured by a mortgage in fee to herself, and the other to a trustee for her, married. The mortgagors having been applied to, but being unable to pay the sums, the trustee paid them to the husband. The husband died, leaving the mortgages untransferred. Held, that he had reduced both sums into possession.—*Rees* v. *Keith*, 11 S. 388.

And see FREE BENCH; PROTECTOR OF SETTLEMENT.

INFANT.

1. (*Guardian—Reference.*) Where there is a competition between different parties for the office of guardian, the Court will in no case make the appointment without a reference.—*Beattie* v. *Johnstone*, 1 T. & P. 17.

2. (*Guardian—Scotch deed and property.*) Where four persons domiciled in Scotland had been appointed by a Scotch deed tutors and curators of the infant and his property, which property was wholly situate in Scotland, but the infant afterwards was sent to reside in England for the benefit of his health, and a bill was then filed by the infant's English relations to have a guardian appointed; it was held by the Lord Chancellor that the Court had jurisdiction, though there was no property in England, and in opposition to the judgment of the Vice-Chancellor of England, that as the deed did not appear to have contemplated the event of the child residing in England, the English relatives

were entitled at any rate to a reference to the Master to inquire into their claims and those of the Scotch tutors and curators.—*Beattie* v. *Johnstone*, 1 T. & P. 17.

INJUNCTION.

1. (*Action at law not under direction of Court.*) A perpetual injunction was granted to restrain a tenant from removing valuable mineral deposits from the soil and banks of a pool in the course of a stream passing through lands of which he was tenant, the injunction being grounded on the verdict in an action brought by the plaintiff pending the proceedings, but not by the direction of the Court, which action turned upon the right of the tenant as such to take the mineral deposits; but in which another ground of defence which he took by his answer, namely, that he removed the soil in order to clear the stream for the purposes of a mill which he had lower down, was not put in issue. —*Thomas* v. *Jones*, 1 Y. & C. 510.

2. (*Proceedings in bankruptcy.*) After decree to account, defendant in equity took steps to make plaintiff a bankrupt under the 1 & 2 Vict. c. 110; whereupon the plaintiff applied for an injunction, which the Court refused, not denying the jurisdiction, but saying that the Lord Chancellor or the Court of Review was the proper Court to restrain the issuing of a fiat, for an improper purpose. The Court also relied on the refusal of plaintiff to admit himself a trader.—*Perry* v. *Walker*, 1 Y. & C. 672.

And see PRACTICE, 15, 25.

INSOLVENT. See TRUSTEE, 2.

ISSUE. See MORTGAGE, 2.

JOINT STOCK COMPANY.

1. (*Payment of calls—Liability of trustees for company—Fraud.*) Pending a bill in parliament for forming a dock company, certain subscribers to the undertaking subscribed for 9000 additional shares, in order to make up the amount of capital required by the standing orders of the House of Lords before the bill could pass that house. Afterwards, but before the bill was passed, those persons signed a declaration that they held the additional shares in trust for the company. After the bill had passed, a meeting of the company resolved unanimously that the trust should be annulled, and the shares be transferred to the secretary, for the use of the company: no transfer, however, was made The directors having made calls, it was held that the subscribers for the additional shares were bound, as trustees, to pay the calls in respect of those shares; but the Court did not think that the alleged fraud upon the House of Lords afforded of itself any ground for annulling the arrangement.—*Preston* v. *The Grand Collier Dock Company*, 11 S. 327. (See Mangles v. Grand Collier Dock Company, 10 Sim. 519.)

2. (*Relief between shareholders—Frame of suit.*) A bill by a member of a numerous incorporated company, *on behalf of himself and all the other members*, except the defendants, praying that a transaction in which the defendants had been the actors, but which had been sanctioned unanimously at a meeting of the company, might be declared fraudulent and void, was sustained, although some of the members on whose behalf the bill was filed had been present and voted at the meeting.—*S. C.*

JURISDICTION. See ECCLESIASTICAL COURTS; INJUNCTION, 2; MUNICIPAL CORPORATION ACT; PRACTICE, 1; WILL, 30.

LANDLORD AND TENANT. See NOTICE.

LEASE.

(*Liability of equitable assignee—Statute of Limitations.*) A party who had become interested in a lease, first as being part of the assets of a partnership, of which he was a member, and then by an arrangement under which he received the rents of an underlease granted by the partnership, but not executed by him: Held liable, as equitable assignee in possession, for non-performance of the covenants; but that such liability, being in the nature of a simple contract, was barred under the statute of limitations by the lapse of six years.—*Sanders* v. *Benson*, 4 B. 350.

LEASEHOLDS. See ADMINISTRATION OF ASSETS, 4.

LEGACY DUTY.

(*Charge for maintenance.*) Where the trustees of a term created by will were to apply so much of the rents and profits of the devised estates as they should think fit, within a certain limit, for the maintenance of the tenant for life, the surplus to accumulate for her benefit, if she married or attained twenty-one. Held, that the money applied for maintenance under the above trust was not subject to legacy duty.—*Shirley* v. *Earl Ferrers*, 1 T. & P. 167.

LIEN. See BANKRUPT; SHIP, 1.

LUNATIC.

(*Maintenance—Reference.*) The Court refused a reference to inquire into the state of mind of an alleged lunatic, and what should be allowed for his maintenance, although there was a suit pending in which the lunatic was a party, and in which there was stock and money standing in his name, but his property, consisting of 4252*l.* three per cents., 906*l.* cash, and a freehold worth 7*l.* a year; the Court though tit was no case for dispensing with a commission.—*Gillbee* v. *Gillbee*, 1 T. & P. 121.

MARRIAGE.

(*Marriage of British subjects abroad.*) Such a marriage, unless made according to the provisions of 4 G. 4, c. 91, or except in some special case of difficulty, must be according to the law of the country where solemnized. Accordingly where a marriage between a British subject domiciled in *England* and a female ward of Court was celebrated, in the presence of the British consul and in the English church at *Antwerp*, by a clergyman of the Church of *England*, who had been appointed chaplain to the church, and was paid by the British government; Held, that the marriage was invalid, as certain ceremonies prescribed by the law of *Belgium* had not been observed.—*Kent* v. *Burgess*, 11 S. 361

MISNOMER. See PRACTICE, 30.

MISTAKE. See PATENT, 1, 2.

MORTGAGE.

1. (*Costs—Tender.*) Costs given in a redemption suit against a mortgagee in possession, who upon an account taken with annual rests was found to have been overpaid.—*Wilson* v. *Cluer*, 4 B. 214. (See S. C. 3 B. 136; L. M. No. 54.)

2. (*Redemption—Claim of title by mortgagee.*) A suit for redemption having been instituted by a party claiming as heir at law of the mortgagor, against a party who also claimed to be the heir at law, and who had got possession of the estate by obtaining an assignment of the mortgage term after notice of the plaintiff's claim; the Court, at the hearing, made an immediate decree for redemption, refusing the defendant an issue to try the plaintiff's title, that title being established to the satisfaction of the Court, and the defendant having entered into no evidence in support of his own claim to the heirship.

Semble, that the Court would have in like manner refused an issue, had the plaintiff made out only a primâ facie case in support of his title, inasmuch as the defendant was to be considered in this suit only as mortgagee, and a decree against him in that character would not preclude him from asserting his title as heir at law in another way.—*Lloyd* v. *Wait*, 1 T. & P. 61.

And see PRACTICE, 22; SHIP, 2.

MORTMAIN ACT. See EAST INDIES.

MUNICIPAL CORPORATION ACT.

(*Invalid lease—Delivery up of deeds—Inquisition.*) Where a bill was filed by the corporation, alleging that a lease was invalid under the 5 & 6 Will. 4, c. 76, s. 94, and praying that the lessee might either pay a higher rent, or restore the lands and deliver up the lease; and the lessee filed a cross-bill, alleging that the inquisition held under the 97th section, as to the value of the land, was collusive, and praying that it might be quashed and delivered up to be cancelled; the Court held, as to the first bill, that the validity of the lease was a legal question, which ought to be first tried before the lease was ordered to be delivered up; and, as to the cross-bill, that it had no jurisdiction to do what was asked.—*Corporation of Arundel* v. *Holmes*, 4 B. 325.

NEXT OF KIN. See ECCLESIASTICAL COURTS.

NOTICE.

(*Parcels of a lease varied by notice.*) A person, with notice that the small tithes of a certain parish are payable to the vicar, obtains an assignment of a lease of the great and small tithes, the grantors of such lease being the trustees of a charity, who are entitled to the great tithes only, but who have always in form granted leases of both kinds of tithes. The assignee, being unable to recover the small tithes at law, procures at law an apportionment of the rent. This Court, under such circumstances, will relieve against the apportionment.—*Attorney-General* v. *Dixon*, 1 Y. & C. 614.

And see BREACH OF TRUST.

OFFICE COPY. See CLERK OF RECORDS AND WRITS.

PARTIES.

1. (*Distinct interests in same fund.*) Where a fund was given to be appropriated in equal shares between the children of A. and the children of B., with cross remainders between the two classes of children, in case of one class failing; and one half of the fund was paid over to A. for his children, and he wasted the money: Held, that the children of B. were not necessary parties to a suit for repairing the breach of trust.—*Overton* v. *Banister*, 4 B. 205.

2. (*Suits by some on behalf of others.*) It is very much a question of convenience, but depending also on the nature and object of a suit, whether some or one of a very numerous class shall be allowed to sue on behalf of the whole. In this

case one of twenty-six residuary legatees, being then presumptively entitled, was admitted to institute a suit on behalf of the whole, for an account of the estate and the establishment of the will, upon which there was some question raised between the legatees and next of kin.—*Harvey* v. *Harvey*, 4 B. 215.

And see ADMINISTRATION OF ASSETS, 5; PRACTICE, 24, 25; VOLUNTARY DEED, 1; WILL, 1.

PARTNER. See CLERGYMAN.

PARTNERSHIP. See PLEADING,

(*Dissolution for lunacy.*) In such a case, the dissolution should reckon only from the date of *the decree.* The Vice-Chancellor of England had decreed it as far back as the time when the lunatic first became incapable as found by the commission.—*Besch* v. *Frolick*, 1 T. & P. 172.

And see RECEIVER, 2; SPECIFIC PERFORMANCE, 3.

PATENT.

1. (*Clerical error—Mode of correction.*) Where there is a clerical error in letters-patent and in the enrolment, the correction should be first made in the letters-patent on application to the Lord Chancellor, before any application is made to the Rolls to correct the enrolment; and where the enrolment had been altered by the Master of the Rolls, without such previous correction, and the Lord Chancellor, on the case coming before him, refused to make the correction, he ordered the enrolment to be brought before him, assisted by the Master of the Rolls, and the error which had been corrected was restored.—*Re Nickel's Patent*, 1 T. & P. 36.

2. (*Clerical error—Terms on which correction allowed.*) Where a patent was taken out for an invention of machinery for *covering* fibrous substances, &c.; and the invention was described in the letters-patent, and in the other written documents, and also in the enrolment, as one for *recovering*, &c., the error having originated in the Home Office, and the patentee had commenced an action for infringement of the patent; the Lord Chancellor would not make the required correction in the letters-patent, except upon the terms of the patentee abandoning and paying the costs of all proceedings then pending against the defendant at law, and undertaking not to bring any action for infringements previous to the correction.—*S. C.*

PAUPER.

1. (*Assigning counsel.*) The Court cannot, under 1 Will. 4, c. 36, assign counsel or solicitors to pauper defendants, on the application of the plaintiffs.—*Garrod* v. *Holden*, 4 B. 245.

2. (*Previous costs.*) A party, admitted to sue in *formâ pauperis*, after the commencement of a suit, may be attached for nonpayment of costs, which have been previously ordered to be paid in that suit, without being first dispaupered. *Davenport* v. *Davenport*, 1 T. & P. 124.

PLEA.

(*Vagueness.*) A plea that the representatives of a deceased child were not parties, not stating that ths child had attained the age required to give him a vested interest: Held, bad.—*Overton* v. *Bannister*, 4 B. 205.

PLEADING.

1. (*Answer of partner—Insufficiency—Inability.*) A defendant, who was required

to set forth in his answers to interrogatories, certain entries in the books of a firm of which he was a member, stated, in his answer, that he and his co-partners had given express directions to their agent, in whose custody the books were, not to produce them to any one, or allow any stranger to inspect them, without the express authority of the defendant and his co-partners, that the books were not in the power of the defendant alone, but of the defendant and his co-partners, and that the defendant had no right or lawful power to produce them, or to set forth their contents, without the consent of his co-partners: Held, that the answers were insufficient, as the defendant did not state that his co-partners had refused to consent to his setting forth the entries.—*Stuart* v. *Lord Bute*, 11 S. 442.

2. (*Answer—Sufficiency—Account.*) Where a defendant was required by the bill to set forth accounts, and he had not been a party to the transaction, but was only the representative of a party, and the accounts required much labour and expense to make them out, it was held, that he was not bound to set them out, but only to supply the materials for making them out, by describing the books and documents in his possession.—*Christian* v. *Taylor*, 11 S. 401.

3. (*Distinctness—Plea of want of parties.*) A plea, that A. B., an equitable mortgagee by deposit of title deeds, was not a party, overruled; the bill alleging, that the deeds were in the defendant's possession, but the plea, though alleging a deposit generally, not stating distinctly that they were deposited with A. B., or that they still remained in his hands.—*Henley* v. *Stone*, 4 B. 389.

And see PRACTICE, 13.

POWER.

1. (*Mistaken execution—held good pro tanto.*) A father executed a power of appointment, under which his four younger children, B., C., D., and E., became entitled, subject to his life interest, to 30,000*l.* in equal shares. The father afterwards, by several instruments of appointment, affected to appoint the whole fund to B., C., and D., in the following shares; viz., to B. 13,000*l.*, to C. 5000*l.*, and to D. 12,000*l.* E., who was a son, died in his father's lifetime intestate and without issue; whereupon his share devolved to the father. After E.'s decease, the father, with a view to support the subsequent appointment, executed a deed-poll, declaring that the original appointment, under which the children took equally, was made by mistake: Held, that though the subsequent appointments were invalid, so far as related to the shares of B., C., and D., yet, as regarded the share of E., the father was bound by the statement in the deed-poll; and that E.'s share, amounting to 7500*l.*, must be apportioned between B. and D., in satisfaction *pro tanto* of the losses which, through the invalidity of the subsequent appointments, had been sustained by their respective shares.—*Armytage* v. *Armytage*, 1 Y. & C. 461.

2. (*Power of advancement.*) Quære, whether a power in the tenant for life to advance children out of the capital is taken away by assignment of the life interest.—*Whitmarsh* v. *Robertson*, 1 Y. & C. 715.

And see WILL, 18.

PRACTICE.

1. (*Abatement—Death of sole plaintiff.*) On death of sole plaintiff, Court will not order that his representatives revive within a given time, or that bill be dismissed. (See also Lee v. Lee, 1 Harr. 617, L. M. No. 59.— *Dryden* v. *Walford*, 1 Y. & C. 625.

2. (*Administration suit—Proof of bond debt.*) The affidavit in support of a bond debt, proved before the Master, need not, in ordinary cases, state the consideration of the bond; but the Master should inquire into it, if there are grounds for suspecting its validity.—*Rundell* v. *Lord Rivers*, 1 T. & P. 88.

3. (*Affidavit—Marksman.*) A marksman signed an affidavit with his name at length, his hand having been guided on the occasion. The affidavit was ordered to be taken off the file.— —— v. *Christopher*, 11 S. 409.

4. (*Appearance—Eighth order, August*, 1841.) The order for entering an appearance for defendant, under the above order, will be made without an intermediate service of the copy upon him.—*Hudson* v. *Martin*, 1 Y. & C. 551.

5. (*Bankruptcy of defendant.*) A sole defendant having become bankrupt, moved that a supplemental bill should be filed against his assignees, or that the bill be dismissed. Motion refused.—*Manson* v. *Burton*, 1 Y. & C. 626.

6. (*Bespeaking order—Plaintiff and defendant.*) An order giving costs to the defendant, and liberty to amend to the plaintiff, though bespoken and paid for by the defendant, may nevertheless be taken out by the plaintiff.—*Henley* v. *Stone*, 4 B. 386.

7. (*Common injunction—Time of obtaining.*) Held, that the common injunction could not be obtained under the 10th Order of December, 1833, unless eight clear days had elapsed after the defendant's appearance without his putting in a plea or answer; the Court adopting the rule of Lord Cottenham in Angell v. Wiscombe, 1 Myl. & Cr. 48, that in construing all the orders referred to, one day is to be included, the other excluded.—*Stanley* v. *Bond*, 1 T. & P. 103.

8. (*Concurrent suits—Joint hearing.*) Where two suits involve the same subject-matter and the same parties, and a decree is made in one of them, the Court will, in some instances, direct the hearing of the other suit to stand over until that in which the decree is made is heard on further directions.—*Cumming* v. *Slater*, 1 Y. & C. 484.

9. (*Concurrent suits—Separate decree.*) Although different suits may involve the same subject-matter and the same parties, the Court will not decline to make a separate decree in each suit, unless the frame of the two suits and the relative position of the parties to each be the same.—*Godfrey* v. *Maw*, 1 Y. & C. 485.

10. (*Contempt—Vacation.*) A defendant in custody under process of contempt for not appearing or not answering, may be brought up, so as to satisfy the 5th Rule of 1 W. 4, c. 36, s. 14, during vacation, provided it be within the period pointed out by that rule for the purpose.—*Clark* v. *Clark*, 1 T. & P. 116.

11. (*Date of order—Alteration by consent.*) A party consenting to the alteration of a date of an order after it had been served, cannot object that the order, as altered, has not been served on him.—*Stubbs* v. *Sargon*, 4 B. 400.

12. (*Demurrer—31st Order, August*, 1841.) The twelve days after which a demurrer, if not set down for argument by the plaintiff, is to be held sufficient, are not *office* days.—*Charlton* v. *Richmond*, 4 B. 397.

13. (*Discovery—Plea or answer.*) Held, that the rule that a party answering at all must answer fully, did not apply to the case of a solicitor made defendant, and objecting to disclose particulars of his client's business.—*Jones* v. *Pugh*, 1 T. & P. 96.

14. (*Dismissal—Notice.*) An order was made that a cause should stand over, with liberty to the plaintiff to amend within a month, and on his making de-

25. (*Injunction—Affidavit.*) Where an answer is filed after notice of motion for a special injunction, affidavits subsequently filed cannot be used to contradict the answer.—*Lloyd* v. *Jenkins*, 4 B. 230.

26. (" *Injunction causes*"—*5th Order*, 1828.) The term " injunction causes" in the 5th Order of April, 1828, means those causes only in which the injunction depends on the exceptions, and not causes in which an injunction is prayed or has been dissolved. Where, therefore, an injunction had been obtained and dissolved, the plaintiff cannot refer the exceptions for insufficiency until the expiration of eight days.—*Parker* v. *Bult*, 4 B. 395.

27. (*Interlocutory application—Judgment as to merits.*) The Court will upon interlocutory application decide upon a fact which is conclusive upon the merits, while an inquiry into that fact properly arises in the course of the cause; the Court referring to Golden v. Ulyate, an unreported case before Lord Eldon. The fact in the case was the validity of a marriage.—*Kent* v. *Burgess*, 11 S. 361.

28. (*Irregularity excused by neglect of other party.*) Plaintiff having obtained an order for liberty to amend within three weeks, filed a bill after that time, without further leave, but the cause of the delay appearing to be that the defendant who had bespoke and paid for the order (which gave him costs) neglected to take it and pass it, and that the plaintiff was erroneously told at the office, that the order having been bespoken and paid for by the defendant could not be taken out by him, the plaintiff, the Court excused the irregularity.—*Henley* v. *Stone*, 4 B. 386.

29. (*Master's report—Hearing of exceptions.*) All parties interested in the master's report may be heard *in support* of the master's report, but none but the excepting party *against it*.—*Bonser* v. *Cox*, 4 B. 379.

30. (*Misnomer—Affidavit.*) An order, obtained on affidavit of service, discharged with costs, on the ground of a misnomer of a party in the affidavit.—*Saloman* v. *Stalman*, 4 B. 243.

31. (*Parties—Second plea for want of.*) A second plea for want of parties is valid where the objection arises out of an intermediate amendment of the bill.—*Henley* v. *Stone*, 4 B. 389.

32. (*Plea of former suit.*) It is irregular to reply to a plea of the pendency of a former suit for the same matter, the proper course being to obtain a reference of the plea to the master.—*Jones* v. *Segueira*, 1 T. & P. 82.

33. (*Preliminary inquiries—Abatement.*) Preliminary inquiries had been directed under the General Order of the 9*th* of *May*, 1839; the sole plaintiff died before the report, and before decree: Held, that a defendant might file a supplemental bill to have the benefit of these inquiries.—*Upjohn* v. *Upjohn*, 4 B. 246.

34. (*Rehearing—Lord Chancellor.*) The rule that there cannot be a second rehearing of a cause before the Lord Chancellor without a special order, applies equally whether the first rehearing is a reversal or an affirmance of the decree or order of the Court below.—*Moss* v. *Baldock*, 1 T. & P. 118.

35. (*Relief between co-defendants—Costs.*) Where a decree has been had against several defendants, with costs, and one of them has been compelled to pay the whole costs, the Court will by consent decree contribution between the co-defendants, on motion in the same suit.—*Pitt* v. *Bonner*, 1 Y. & C. 670.

36. (*Schedule—Bundle of documents.*) Held, that it was sufficient to set forth " three sealed hogsheads containing papers."—*Christian* v. *Taylor*, 11 S. 401.

37. (*Serjeant at arms by consent, 21st Order,* 1833.) Where further time for answering is given to defendant on condition of his entering an appearance and *consenting* to a serjeant at arms, the order should be so drawn up as to be available only on the condition being performed, but where the condition was put as a distinct act which the defendant undertook to perform, and he put in an answer under the other part of the order, the Court would not make any order on him to fulfil the condition.—*Henley* v. *Stone*, 4 B. 392.

38. (*Supplemental bill.*) The proper object of a supplemental bill in aid of a decree is simply to carry out that decree, and if it is sought in any way to vary the decree, it is then a supplemental bill in the nature of a bill of review, and cannot be filed without leave. Accordingly where after a common decree against executors for an account, the plaintiff, without leave, filed a supplemental bill, alleging that he had discovered in the master's office that the defendants had been guilty of misconduct, and seeking relief accordingly, the Court ordered the bill to be taken off the file, though it was also a bill of revivor, and as such, might have been filed without leave.—*Hodson* v. *Ball*, 1 T. & P. 177.

39. (*Taxation of costs—Joint bill.*) Bill of costs incurred by two persons ordered to be taxed, on the application and upon the undertaking of one.—*Lockhart* v. *Hardy*, 4 B. 224.

And see Administration of Assets, 2—Clerk of Records and Writs—Charity, 3—Infant, 1—Lunatic—Pleading, 2—Receiver, 1.

PRINCIPAL AND SURETY.

1. (*Release by variation of contract.*) A. agreed to become surety for B., for repayment of an advance to be made in the shape of a draft at three months. The advance was made by an immediate payment: Held, that the surety was discharged.—*Bonser* v. *Cox*, 4 B. 379.

2. (*Same point.*) In the same case A. agreed to join B. as his surety on a joint and several bond, upon receiving from him a counter bond of indemnity; the original bond was executed by A. only, and it did not appear that the obligee had taken any pains to procure its execution by B. the principal debtor. Held, that A. the surety was discharged on that ground also.—*S. C.*

PRODUCTION OF DOCUMENTS.

1. (*Cases and opinions in other suits.*) Cases and opinions relating to litigation many years ago between the defendants and other parties, upon the subject of the claim in question in the suit, and also upon the subject of another claim resting upon similar grounds, held to be privileged.—*Coombe* v. *The Corporation of London*, 1 Y. & C. 631.

2. (*Documents relating to title of both parties—Pleading.*) To protect a defendant from the discovery or production of a document relating to the subject in dispute, it is not sufficient that it should be evidence of his title, or in support of his case; it must contain no matter supporting the plaintiff's title or the plaintiff's case, or impeaching the defence, and the defendant must aver by his answer, with a reasonable degree of distinctness, that the document does contain no such matter.—*S. C.*

3. (*Official correspondence—East India Company.*) It was held that a correspondence between the directors of the company and the Board of Control, relating to the claim of the plaintiff, was privileged from production, although the claim arose out of a purely commercial transaction. The Court adverting to the pro-

visions of the 3 & 4 Will. 4, c. 85, which made the communication between the directors and the Board of Control necessary in such a case.—*Smith* v. *The East India Company*, 1 T. & P. 50.

4. (*Right of defendant to production or inspection.*) The Court cannot, at the instance of the defendant, order a plaintiff to produce for the defendant's inspection documents stated in his bill to be in the plaintiff's possession. In such a case, where it is necessary for the defendant to see the documents, in order to put in his answer, the Court, though it cannot compel their production, will extend the time for answering until after the plaintiff has produced them. The fact of the documents being in the plaintiff's possession must however appear upon the record.—The decision in *The Princess of Wales* v. *The Earl of Liverpool*, approved of.—*Taylor* v. *Heming*, 4 B. 235.

PROTECTOR OF SETTLEMENT.

(*Felony of tenant for life.*) The 3 & 4 Will. 4, c. 74, s. 33, does not make the Court of Chancery protector of the settlement, where the husband alone of the tenant for life has been convicted of felony, although the estate be not settled to the wife's separate use.—*Re Wainewright*, 11 S. 352.

RECEIVER.

1. (*Discharge of—Infant coming of age.*) A receiver appointed for the benefit of two infant tenants in common not discharged on one coming of age.—*Smith* v. *Lyster*, 4 B. 227.

2. (*Partnership—Denial of plaintiff's title.*) A receiver of a partnership granted in a case where no misconduct or mismanagement was alleged, on the ground that the defendant insisted on a legal objection as destroying all right of his partner to a share in the partnership.—*Hale* v. *Hale*, 4 B. 369.

3. (*Trustee not acting.*) Where one of two trustees of real estate declined to act, the Court appointed a receiver on behalf of infant *cestui que trust*; but with liberty to either of the trustees to offer himself.—*Tait* v. *Jenkins*, 1 Y. & C. 492.

REGISTRATION.

1. (*Memorial.*) The executor of a mortgagee, a memorial of whose security was registered under the Middlesex Registry Act, conceiving that the memorial was invalid, affected to re-execute the mortgage deed, by signing and sealing it himself, in the presence of two witnesses, whose names were indorsed as witnesses attesting his execution of it. Neither of the witnesses had attested the execution of the deed by any of the other parties. The executor then memorialized the deed in due form. Held, that the whole course of proceeding (which was said to be in accordance with the practice before the Register) was nugatory for the purpose of the Registry Act.—*Essex* v. *Baugh*, 1 Y. & C. 620.

2. (*Priority after notice.*) A subsequent incumbrancer, who, at the time of taking his security, has no notice of the prior incumbrance, may, by properly memorializing his security, though after notice, obtain priority over the prior incumbrancer, if the memorial of the security of the latter be defective.—*S. C.*

And see SHIP, 2.

REHEARING. See PRACTICE, 35.

SETT-OFF.

(*Retainer.*) A.'s assignees having, under the circumstances stated 1 Y. & C. p. 183, disclaimed in Court all interest in the 431*l.* consols: Held, that the trus-

tees of the settlement having acquired possession of that sum in the character of trustees, were entitled to retain such possession for the purposes of the settlement until full satisfaction should be made of what was due to them in respect of W.'s bond for 5000*l.*—*Burridge* v. *Row*, 1 Y. & C. 583. (See S. C., Law Mag. No. 55.)

SETTLEMENT.

(*Construction—Vesting—Marriage or twenty-one.*) Where property was settled by voluntary deed in trust for A. for life, and at his death for his lawful issue, "if then of age or married," in equal shares if more than one, if only one to be paid to that one, or in case such child or children should be an infant or infants at the death of A. then to be paid to him or them as aforesaid on their attaining twenty-one if sons, or if daughters *on their marriage* respectively: Held, that a daughter became entitled on marriage or twenty-one.

N.B. The Court doubted whether all the children in esse at A.'s death were not entitled without regard to marriage or majority.—*Lang* v. *Pugh*, 1 Y. & C. 718.

And see TRUSTEE, 2.

SHIP.

1. (*Lien of captain for disbursements.*) *Quære*, whether the captain has a lien for ordinary disbursements, on the proceeds of a sale of a ship, the bill given by the purchaser having got into his hands.—*Lister* v. *Payn*, 11 S. 348.

2. (*Mortgage—Register.*) A mortgage of a ship is good as between the mortgagor and the mortgagee, without registry under the 3 & 4 Will. 4, c. 55.—*S. C.*

3. (*Suit for damage done—53 Geo. 3, c. 159—Time of filing affidavit.*) Where an act of parliament required that to all bills which should be filed under its provisions an affidavit of a certain form should be annexed: Held, that it was no objection to an affidavit which had been annexed to a bill filed under the act, that it had been sworn three days before the bill was filed.—*Walker* v. *Fletcher*, T. & P. 115.

SOLICITOR.

1. (*Discharge of agent.*) Agent of a solicitor held by the irregularity of his conduct, particularly by charging more for fees than he had paid, to have discharged himself; and ordered to deliver up papers before taxation of costs, the principal undertaking to redeliver them as the Court should order.—*Re Smith*, 4 B. 309.

2. (*Taxation of agent's bill—Payment into Court.*) In general a solicitor cannot obtain the taxation of his agent's costs without bringing the amount into Court; but, under special circumstances, that condition will be dispensed with or the amount limited.—*S. C.*

3. (*Taxation of costs—General money account.*) An account of all the dealings and pecuniary transactions not connected with the bills of costs, cannot be obtained upon a petition for the taxation of costs. The account directed on petition being limited to monies paid or duly appropriated towards satisfaction of the bills.—*S. C.*

4. (*Taxation of costs—Special agreement.*) The Court will not upon *petition* direct a taxation of costs upon the footing of any special agreement, as that money out of pocket only shall be charged for unsuccessful business.—*S. C.*

And see PRACTICE, 13.

SOLICITOR AND CLIENT.

1. (*Privileged communication—Mortgage in solicitor's name.*) In a suit for redemption by a judgment creditor of A., a mortgagor, and B. a solicitor, who had a mortgage on A.'s property in his own name, but in trust for other parties, his clients; and had been employed by other clients also in advancing money upon it by way of mortgage, it was held on the authority of Harvey v. Clayton, 2 Swans. 221, n. that B. was not bound to disclose either the names of the parties for whom he held the mortgage, (he swearing by his answer that he was authorized to give discharges for the money when repaid,) or the names of the other clients for whom he had effected mortgages.—*Jones* v. *Pugh*, 1 T. & P. 96.

2. (*Privileged communications.*) The Lord Chancellor held that all professional communications between a solicitor and his client relating to the business of the latter, and whether relating or not to any litigation pending or expected, were privileged, approving of the decision of the Court of C. P. in Cromack v. Heathcote, 2 Brod. & Bing. 4, and disapproving of the cases in which the protection had been narrowed.—*Herring* v. *Clobery*, 1 T. & P. 91.

And see PRACTICE, 40.

SPECIFIC PERFORMANCE.

1. (*Acceptance of agreement.*) Specific performance of an agreement refused, the same not having been accepted by the plaintiff in due time, nor any acceptance by him ever notified to the defendant, and the plaintiff having, after the defendant had signed the agreement, attempted to vary the terms of it, though he ultimately acquiesced in the defendant's terms.—*Thornbury* v. *Bevill*, 1 Y. & C. 554.

2. (*Defective right to contract—Sale by trustees.*) Where there was at the time of the contract a want of competency or right to contract in one of the parties, as for instance, where the trustees of a will, with power to sell with consent of tenant for life, make a contract without having obtained the consent of the tenant for life, *semble*, that subsequent consent will not cure the defect.—*Adams* v. *Broke*, 1 Y. & C. 627. (See *infra*, Eyston v. Symonds—VENDOR AND PURCHASER, 6.)

3. (*Partnership—Use of retiring partner's name.*) *Quære*, whether a court of equity will enforce the specific performance of an agreement that, upon the retirement of a solicitor from a copartnership, the remaining partner shall carry on the business in the name of the retiring partner.—*Thornbury* v. *Bevill*, 1 Y. & C. 554.

4. (*Signature of draft.*) *Quære*, whether the signature of an attorney to a statement at the foot of a draft agreement, signifying his approval of the draft on behalf of his client, is a signature within the Statute of Frauds.—*S. C.*

STAMP.

(*Secondary evidence.*) Secondary evidence not admitted of a deed, which was presumed to be unstamped, chiefly because there was no charge for stamp in the solicitor's bill for preparing it.—*Rose* v. *Clark*, 1 Y. & C. 534.

STATUTE OF FRAUDS. See SPECIFIC PERFORMANCE, 4.

STATUTE OF LIMITATIONS.

(*Absent debtor—Dying abroad.*) In the case of a *debtor* going abroad before the right of action accrues, and dying there, the statute begins to run only from the time of probate or administration being taken out.—*Story* v. *Fry*, 1 Y. & C. 603.

And see LEASE.

TAXATION OF COSTS. See SOLICITOR, 3, 4.

TERM. See COMPUTATION OF TIME.

TIMBER. See PRACTICE, 21.

TRIAL AT LAW. See PRACTICE, 16.

TRUSTEE.

1. (*Breach of trust—Admission—Payment into Court.*) In a suit against trustees for a breach of trust, one of them admitted that the funds had been sold out, by means of a power of attorney executed by him for the purpose, as he stated, of investing on more advantageous securities; he stated that he was not concerned in the receipt of the produce, but he had been informed that it had been received by his co-trustee, or by J. M. by his permission. The settlement contained a power to vary the investments: Held, that there was not, on the answer, a sufficient admission to justify an interlocutory order on this trustee for payment of the money into Court.—*Meyer* v. *Montriou*, 4 B. 343.

2. (*Direction to trustee—Qualified by change of circumstances*) By a clause in a marriage settlement, trustees were empowered and *required*, at the request in writing of the wife, to advance part of the trust monies to the husband on the security of his bond. After the marriage the husband was arrested, and took the benefit of the Insolvent Debtors' Act. The wife then applied to the trustees for a loan to the husband, according to the terms of the settlement: Held, that such a change had taken place in the circumstances of the husband, as rendered the clause inapplicable, and that the trustee was justified in refusing to lend the money.—*Bass* v. *Godsall*, 1 Y. & C. 617.

3. (*Refusal to transfer—Suspicious case.*) Where the husband, with the concurrence of wife, assigned her life interest in a fund, in consideration, as it was expressed, of a particular sum, which it appeared was only partially paid, and the trustees refused to pay the dividends to the assignee, though the assignment was held good in a suit by such assignee, the trustees were allowed their costs as between solicitor and client.—*Whitmarsh* v. *Robertson*, 1 Y. & C. 715.

And see APPOINTMENT.

VACATION. See PRACTICE, 10.

VENDOR AND PURCHASER.

1. (*Avoidance of contract.*) It was one of the conditions of sale, that if an objection to the title was not removed within fourteen days, the *vendor* should be at liberty to annul the contract. The vendor took an objection, for want of the concurrence of some annuitants who had a charge on the estate (subject to debts), and having insisted upon that objection, the vendor gave notice to annul: Held, afterwards, in suit for specific performance by purchaser, that the objection was one of title; that it was not valid; and that the notice to annul not having been given with a view to escape from the performance of a duty, had put an end to the contract.—*Page* v. *Adam*, 4 B. 269.

2. (*Construction of conditions.*) Held, that facts stated in one of the conditions of sale as the grounds of such conditions must be proved, though it appeared to be the object of the condition, but not very clearly stated, to exclude inquiry into those facts.—*Symons* v. *James*, 1 Y. & C. 487. (See *infra*, No. 4).

3. (*Dilapidation after contract—Common error as to title.*) The decree in a suit for specific performance established that a good title had been shown within

a few days of the original contract. There had been, however, after that time a second agreement between the parties, qualifying the terms of the original contract, and which was made under the impression that a good title had not then been shown since the date of the original contract, which was more than thirteen years before the decree, but only fifteen months before the bill was filed. There had been great dilapidation in the property: Held, that the whole of the loss incurred thereby fell upon the purchaser, but that interest on the purchase money only ran from the filing of the bill, and interest also was given to the purchaser in the terms of the second agreement, between the date of that agreement and the filing of the bill, upon the balance of his purchase money then lying unproductive.—*Minchin* v. *Nance*, 4 B. 332.

4. (*Restricting inquiries as to title—Obscurity.*) The subject of sale was described in the conditions, "as a leasehold ground rent of 23*l.*, reserved by a *mesne* lease in 1812, for ninety-eight years wanting seven days, and assigned apart from the reversion by an indenture of 1817, and one of the conditions was that no title prior to the assignment, or the title of any ground or mesne landlord was to be produced. From a recital in the deed of 1817, it appeared that the land out of which the rent issued had been demised with other lands to the original lessee at a rent of 10*l.*, and subject to certain covenants and conditions: Held, that the purchaser might take an objection on this ground, the conditions of sale not excluding such an objection with sufficient clearness.—*Taylor* v. *Martindale*, 1 Y. & C. 658.

5. (*Sale subject to annuities—Right of purchaser to inquire.*) There is no distinction between annuities and other legacies, as to the right or duty of a purchaser to inquire into the satisfaction of such charges, where the estate sold is by the will first charged with the debts, and then with the annuities: And it was held, that the purchaser had no right to require the concurrence of the annuitants, even in a case where the devisee selling, who was also executor, admitted *by his answer*, that the personalty was sufficient for the payment of the debts.—*Page* v. *Adam*, 4 B. 269.

6. (*Title made good after decree—Alienage.*) A person contracted to sell an estate, who at the time of the contract had no legal or equitable title to it, by reason of the alienage of a party through whom he claimed. The purchaser, by his own inquiries, ascertained the defect of title, but did not till after some months of negotiation with the vendor repudiate the contract. The vendor then filed his bill for specific performance, and, pending the investigation of the title in the Master's office, obtained a grant of the estate from the Crown: Held, that he was entitled to a decree.—*Eyston* v. *Symonds*, 1 Y. & C. 608.

VISITOR. See CHARITY, 6.

VOLUNTARY DEED.

1. (*Claim in administration suit—Parties.*) A person having obtained possession from the executors of certain chattels of the testator, under a voluntary deed executed by the testator, and purporting to convey all the chattels that should at the death of the testator be in a particular place, was held to have been properly made a party to the suit, and ordered to refund what he had received from the executors.

Quære, what would have been the effect of the deed if proved as testamentary. —*Consett* v. *Bell*, 1 Y. & C. 569.

2. (*Illegitimate children.*) Where there was a settlement of personalty in trust for afterborn illegitimate children, the property was, on the bill of the settlor, ordered to be re-transferred to him.—*Wilkinson* v. *Wilkinson*, 1 Y. & C. 657.

WEST INDIA ESTATE.

(*Lien of consignee.*) The question was reserved, whether the consignee of a West India estate had a lien for the expenses of cultivation upon the compensation money awarded to the estate, his lien for payment of an annuity charged on the estate being allowed.—*Shaw* v. *Simpson*, 1 Y. & C. 732.

WILL.

1. (*Construction—Bequest—Pecuniary or residuary.*) Testator having given the residue of his real and personal estate upon certain trusts, for the benefit of his children and their issue, in default of such issue gave several legacies: Held, that the legacies were pecuniary, and that the legatees were not necessary parties to a suit for administering the estate.—*Pidgeley* v. *Rawling*, 1 Y. & C. 552.

2. (*Construction—Charge—Annuities—Legacies.*) Testator, after directing his debts, funeral, and testamentary expenses to be paid as soon as conveniently might be after his death, bequeathed several annuities and pecuniary legacies to various persons, directing the legacies, except one which was given to a person under twenty-one, to be paid within twelve calendar months after his death. He then declared that the several annuities thereinbefore bequeathed should be charged upon his real estates. By a subsequent clause he charged all his real estate with the payment of all his debts, funeral and testamentary expenses, and legacies, or of such part thereof as his personal estate not specifically bequeathed should be insufficient to pay and satisfy: Held, that the annuities were primarily, if not solely, charged upon the testator's real estate; and that under the term "legacies," he did not mean to comprise annuities.—*Shipperdson* v. *Tower*, 1 Y. & C. 441.

3. (*Construction—Charge—First general—Then special.*) Testator having first charged his real estate generally, in aid of his personalty, with payment of his debts and legacies, afterwards by a codicil directed that all legacies should be paid out of a particular freehold property, so that his *estate* might not be charged with them: Held, that the effect of this was not to exonerate the personalty, but only to throw upon the particular freehold the subsidiary charge which would otherwise have fallen upon the whole real estate.—*S. C.*

4. (*Construction—Conflicting clauses—Residue—Enumeration—Conversion.*) A testator began his will by bequeathing the whole of his property to his wife, and afterwards to be equally divided between his children. He then gave to each of his children and to his wife some pecuniary and specific legacies, and afterwards bequeathed as follows: "The property, my house, 21, *North-street, St. Marylebone*, let on lease at 48*l.* a year, 1000*l.* new 4 per cents., 1500*l.* in the 3 per cents. consols, 645*l.* in the threes reduced, and 20*l.* per annum in the long annuities, all this I give to my wife, with the residue and interest, should there be any." Held, that the widow took a life interest only in the general residue, including the particulars enumerated in the concluding clause, but that of those particulars she was entitled to the enjoyment in specie.—*Vaughan* v. *Buck*, 1 T. & P. 75.

5. (*Construction—Conversion—By act of third party.*) Where lands let on lease, subject to an election in the lessee to purchase the fee simple, were devised by

their specific description, not in general terms, as in Lawes v. Bennett, 1 Cox, 171, and after the death of the testator the lessees elected to purchase: Held, that the purchase money went to the specific devisees of the land.—*Drant* v. *Vause*, 1 Y. & C. 580.

6. (*Construction—Election—Freebench.*) Where testator devised among other things a copyhold subject to freebench, making no distinction as to the mode of enjoyment between the copyhold and other lands, it was held, chiefly on that ground, to be a case of election for the widow.—*Taylor* v. *Taylor*, 1 Y. & C. 727.

7. (*Construction—Freehold and leasehold collieries.*) Testator being seised in fee of freehold collieries, for which he received a rent, and also having shares in a leasehold colliery, directed that his legacies should be paid "out of the rents and profits of his collieries:" Held, that the freehold collieries only were charged.—*Shipperdson* v. *Tower*, 1 Y. & C. 441.

8. (*Construction—Gift to a class.*) Held, that a gift of a residue "to the children of A., to wit (*naming them*)," was a gift to them as individuals, and that one of them having died in testator's lifetime, his share lapsed.—*Bain* v. *Lescher*, 11 S. 397.

9. (*Construction—Inconsistent clauses—Codicil—General rule.*) There were two inconsistent clauses in a will; by the former, the surplus rents of the testator's real estates, after maintenance of the person entitled to possession until 25, were added to the residue of the personal estate; by the latter, the surplus rents, after maintenance of such person until 21, (provided his attaining 21 happened within the legal limit of time,) were settled upon the same trusts as the realty; testator then, by a codicil reciting the former clause, directed that the person entitled to the possession of the estate should be let into the receipt of the rents and profits at 21: Held, that, as the codicil merely affected the surplus rents between the ages of 21 and 25, and as in other respects the latter of the two clauses in the will was more probably consistent with the testator's intentions, the latter clause should prevail against the former, notwithstanding the express recognition of the former clause by the codicil. The rule of law in favour of preferring the latter to the former of two dispositions in a will dealing differently with the same subject, is applied only after the failure of every endeavour to give a reasonable construction to the entire dispositions as will render every part of them operative.—*Shipperdson* v. *Tower*, 1 Y. & C. 441.

10. (*Construction—Lapse—Residue.*) Where a residue was to be divided in three portions, and one-third was given to A., another third to B., and as to the other third, "500*l.* part thereof, to C., and the residue and remainder of such third to other parties," and C. died in the lifetime of testatrix: Held, that the 500*l.* lapsed to the next of kin.—*Lloyd* v. *Lloyd*, 4 B. 231.

11. (*Construction—Legacies to executors.*) Testator appointed A. and B. his executors, and after making certain bequests, gave them *by name* legacies of 500*l.*, giving also in the same sentence legacies of the like amount to two other parties; A. and B. renounced: Held, that they lost their legacies.—*Calvert* v. *Sebbon*, 4 B. 222.

12. (*Construction—Misdescription—Evidence.*) Testator bequeathed a legacy to "The London Orphan Society, City Road." There was no charity precisely answering the description; but there was an "*Orphan Working-school*" in *the City Road*, and a "*London Orphan* Asylum" at Clapton: Held, that the former

of the two charities came within the description, and that there was not sufficient ambiguity to admit evidence of intention.—*Wilson* v. *Squire*, 1 Y. & C. 654.

13. (*Construction—Misnomer—Evidence.*) Testator devised to the *second son of Edward Weld of Lulworth* for life, remainder to his sons successively in tail male, remainder to the third and other sons, except the eldest, of the said Edward Weld and their sons, remainder to the first and other sons of each brother, except the eldest, of the said Edward Weld, successively in tail male, with remainder to the second and other sons of Lady Stourton, one of the sisters of the said Edward Weld, successively in tail male.

At the date of the will and of the death there was no such person as Edward Weld of Lulworth; but Joseph Weld was then in possession of Lulworth, who had an elder brother, and whose sister was Lady Stourton, and who had two sons, the eldest of whom was named Edward Joseph, but was commonly called Edward: Held, upon this evidence of the state of the family, and without having recourse to evidence of the testator's declarations, which the Court thought were not admissible, that the second son of *Joseph* was entitled under the description of the second son of *Edward*.—*Blundell* v. *Gladstone*, 11 S. 467.

(Affirmed on appeal by the Lord Chancellor, assisted by Patteson and Maule, Justices.)

14. (*Construction—Money—Stock.*) Testatrix, after directing payment of her funeral expenses, gave the remainder of her monies to A., and then to another person "all her wearing apparel, trinkets, and all other property whatsoever:" Held, that stock in the funds passed by the latter and not by the former clause. —*Willis* v. *Plaskett*, 4 B. 208.

15. (*Construction—Next of kin.*) By the settlement made on the marriage of E. M., the ultimate limitation of personal property was, "to such person or persons as at the time of the death of E. M. should be her next of kin." E. M. died leaving a father, mother, and a child: Held, that, under this limitation, the father, mother, and child, took as her next of kin in joint tenancy.—*Withy* v. *Mangles*, 4 B. 358.

16. (*Construction—Next of kin—Implied exclusion.*) The property in the last case was limited to the wife for life, with remainder to husband for life, with remainder to the children of the marriage, to be vested at 21 or marriage; and in case none should attain that age or marry, then in trust for the brothers and sisters of the wife, or their issue, as she should appoint, and, in default of appointment, in trust for her next of kin: Held, that the children of the marriage were not excluded from taking under the ultimate limitation.—*S. C.*

17. (*Construction—Per stirpes or per capita.*) A testatrix directed her trustees to divide the rents, &c. of her real estate equally between A., B., C., and D. the widow of E, until E.'s children attained 21; and upon their attaining 21, the trustees were to sell and divide the produce between A., B., C., and the children of E., "in equal shares and proportions as tenants in common; but if D. married, her part of the income was to be applied to the maintenance of E.'s children; and she gave the residue of her real and personal estate "equally between A., B., C., and the children of E. who attained 21; there were four children of E. who attained 21: Held, that they did not take the property *per capita* with A., B., and C., but one-fourth only between them.—*Brett* v. *Horton*, 4 B. 239.

18. (*Construction—Power—Vesting.*) A testator bequeathed 1700*l.* stock to trustees, in trust to pay the dividends to J. C. and S. his wife during their lives and the life of the survivor; and after their decease, then in trust to transfer or pay over the stock unto their children, in such shares and proportions as the survivor of them, J. C. and S. his wife, by his or her last will, should direct or appoint. At the death of the testator, J. C. and S. had three children living. After the deaths of S. and two of those children, J. C. by will appointed the whole fund to the only surviving child: Held a good appointment.—*Woodcock* v. *Renneck*, 1 T. & P. 72.

19. (*Construction—Remoteness—Death without heirs.*) Testator, after giving property to his three children and the longest liver of them and their heirs, directed "that, should all his children *die without heirs*, the property was to be divided between the children of his brothers and sisters *alive* on the death of his last child." The Court thought, but with some doubt, that the limitation over was void. An appeal is now pending.—*Garratt* v. *Cockerell*, 1 Y. & C. 494.

20. (*Construction—Remoteness—Vested or paid.*) Bequest in trust for all the children (then unborn) of A. *to be vested* at 25 for sons, and at that age or marriage for daughters, with a subsequent direction that, if only one child, the whole should *be paid* to that child at 25, or marriage with consent, if a daughter: Held, that the vesting, and not the payment only, was postponed till 25 or marriage, and that the bequest was void for remoteness.—*Griffith* v. *Blunt*, 4 B. 248.

21. (*Construction—Residue—Excepted part.*) Testator, disposing "of the property of which he should be possessed at his death, after payment of debts and expenses," first made several bequests, specific and general, and then, after directing a certain purpose to be fulfilled out of the surplus property which should remain, gave the remainder in a certain way: Held, that the latter gift was a gift only of the residue that should remain after deducting what would be required for the object proposed, and that, in the event of that object failing through illegality, the failure would not enure for the benefit of the residuary legatee.—*Mitford* v. *Reynolds*, 1 T. & P. 185.

22. (*Construction—Specific legacy—Stock.*) Testator bequeathed the sum of 4000*l.* capital stock in the 3 per cent. consols, or in whatever of the Government funds the same should be found invested: Held, that this was a specific legacy; and that the executor having paid one dividend on the stock, which became due within a year after the testator's death, to the residuary legatee, must refund to the specific legatee.—*Hosking* v. *Nicholls*, 1 Y. & C. 478.

23. (*Construction—Successive interests.*) Testator directed that the legacies given by his will to females, married or single, should be for their own benefit and their children, and should never be subject to the control of their respective husbands: Held, that the females took for their lives, for their separate use, with remainder to their children.—*Bain* v. *Lescher*, 11 S. 397.

24. (*Construction—"Survivors and others."*) Legacies to the children (by name) of the testator's late niece M., to be assigned to them when and as soon as they should respectively attain twenty-five. Provided that if any should die under twenty-five, leaving issue, the issue to take the parent's legacy; but if any should die under twenty-five, without having issue then living, the legacy of the child so dying to go and be paid to the "survivors and survivor, and others and other" of the same children, in equal shares. At the death of the

testator, all the children of M. are under twenty-five. All afterwards attain twenty-five, except A., who dies under that age, without issue, having survived two of the children, B. and C. The share of A. devolves to the representatives of B. and C., together with the children, who survive A.—*Slade* v. *Parr*, 1 Y. & C. 565.

25. (*Construction—Survivorship.*) Bequest to A. and B., in equal moieties; but in the event of the death of either, the whole to the survivor; and on the demise of either, should they have no children, then over: Held, that the survivorship was confined to death in testator's lifetime.—*Clarke* v. *Lubbock*, 1 Y. & C. 492.

26. (*Construction—Trust by implication.*) Testator by his will directed that his trade should be carried on by his daughter and others, as trustees, for ten years, when the property was to be sold, the produce invested in the funds, in trust, as to one moiety, for the benefit of the daughter and her children; and as to the other moiety, for the benefit of the children of his brother. By a codicil, the testator revoked that part of his will which empowered his trustees to sell his effects; and, instead thereof, he authorized his daughter to take possession of all furniture, stock in trade, &c., to be disposed of at her discretion: Held, that the effect of the codicil was not to alter the enjoyment of the property, but only to constitute the daughter sole trustee under the will.—*Newman* v. *Lade*, 1 Y. & C. 680.

27. (*Construction—Uncertainty.*) A direction to build "a suitable, durable, and handsome monument," held not void for uncertainty in the amount that might be required for the purpose.—*Mitford* v. *Reynolds*, 1 T. & P. 185.

28. (*Construction—Vesting—Survivorship.*) Gift to A. for life, remainder to B. and C., or such of them as should survive A.; or, as to the share of each parent, to the children of either who should then be dead, leaving children: Held, that B., dying without issue in A.'s lifetime, took nothing.—*Wallis* v. *Plaskett*, 4 B. 208.

29. (*Conversion—Date of interest—Tenant for life of residue.*) Residuary personal estate of a testator, which, at the time of his death, stood invested in securities not recognized by this Court, having been valued by the Master, as at the period of one year after the testator's death, the Court ordered the interest on the value so taken (not exceeding 4*l.* per cent.) to be paid to the tenant for life from the testator's death.—*Caldecott* v. *Caldecott*, 1 Y. & C. 757.

30. (*Effect of will simply negative.*) Where a will declared "that testator's widow and her child should be cut off from all part of his property," but contained no disposition of the property, it was treated as an intestacy, and the widow and child held entitled to share accordingly.—*Johnson* v. *Johnson*, 4 B. 318. (Unreported cases before Sir L. Shadwell in 1838.)

31. (*Foreign will—Probate.*) A British subject, resident in *France*, made his will and died there, having appointed A. and B., who were resident in *France*, and C. and D., who were resident in *England*, his executors. The will was translated into French, and the translation was registered by A. and B., in the proper court in *Paris*. A duly authenticated copy of the translation was then procured, and translated into English by a notary public in *London*, and that translation was proved by C. and D. in the Prerogative Court.—*Bain* v. *Lescher*, 11 S. 397.

32. (*Jurisdiction—Fraud in obtaining.*) Courts of equity have no jurisdiction to

relieve against any such fraud in obtaining a will of personal estate, as would be a ground for setting it aside in the ecclesiastical court; and upon that ground, a demurrer, which had been overruled by the Master of the Rolls, was allowed on appeal, to a bill which alleged that the testator, having first made considerable bequests to the plaintiffs, had afterwards reduced them to a very small amount, upon fraudulent representation made to him as to the plaintiff's character, at the instance of the residuary legatee.—*Allen* v. *Macpherson*, 1 T. & P. 133.

33. (*Unconsecrated burial.*) *Quære*, whether a direction to bury testator in a monument to be erected in unconsecrated ground, is void.—*Mitford* v. *Reynolds*, 1 T. & P. 185.

And see COMPUTATION OF TIME.

APPEALS ON REPORTED CASES.

1. (*Charge of debts.*) Price v. North, 4 Y. & C. 509, L. M. No. 54. The judgment of the Chief Baron in this case reversed.—1 T. & P. 85.
Affirmed. 1 T. & P. 202.
2. (*Pleading—Misjoinder.*) Anderson v. Wallis, 4 Y. & C. 336, L. M. No. 54.
3. (*Voluntary trust.*) M'Fadden v. Jenkyns, 1 Harr. 458, L. M. No. 59. The decision establishing the trust affirmed. 1 T. & P. 153.

SPECIAL CASES IN BANKRUPTCY.

ORDER AND DISPOSITION.

1. (*Executor de son tort.*) Two of the children of an intestate trader take possession of his stock, and carry on trade for two years, but without taking out administration, paying the funeral expenses and some of the debts, but in other respects dealing with the property as their own; one of them selling his share to the other. Afterwards, upon their becoming bankrupts, another of the children took out administration: Held, reversing the decision of the Court of Review, that the effects of the intestate passed to the assignees.—*Re Thomas*, 1 T. & P. 159.

2. (*Policy of assurance—Notice to company, 2 & 3 Vict. c. 29.*) Where a policy of assurance had been deposited by the bankrupt as a security, but no express notice was given to the company till after the act of bankruptcy, the Court inclined to think that express notice was required; but that the notice given, though subsequent to the act of bankruptcy, was made sufficient by the 2 & 3 Vict., as part of a transaction completed before the fiat, and without notice of the bankruptcy, no such notice being suggested in the case.—*Re Styan*, 1 T. & P. 105.

PARTNERSHIP.

(*Joint and separate estate—Security.*) Held by the Lord Chancellor, affirming the decision below, that a creditor, having a security on the joint property, might prove for his whole debt against the separate estate of each partner.—*Re Plummer*, 1 T. & P. 56.

HOUSE OF LORDS.

[Containing Cases in 8 Clark and Finnelly, Parts 2 and 3, omitting Cases noticed in former Digests.]

AGREEMENT.

(*For the purpose of qualification.*) Where the owner of a lease agreed to sublet to his brother for three lives, including that of his brother, at a rent of 350*l.* to commence only at the death of the brother, and he, the lessor, was to be subject in the meanwhile to a rent of about 80*l.*, besides the assessments, and he continued in possession; and it appeared that the agreement had for its object to give a qualification as member of parliament to the lessee, and was not intended to be carried into effect: Held, affirming the decree of the Court below with costs, that the lessee was not entitled to specific performance.—*Callaghan* v. *Callaghan*, 8 C. & F. 374.

BISHOP'S LEASE.

(*Renewal—Charge of annuities.*) A lessee of a bishop's lands in *Ireland*, with a custom of renewal, granted subleases, with covenants to renew on payment of rents and fines. The subleases became vested in R., who charged the lands, and other lands of which he was seised in fee, with annuities; and conveyed both descriptions of lands to a trustee, to secure the annuities, with power, if they should be in arrear, to raise payments by sale or other means. R.'s interest in the leasehold and freehold lands was assigned to Haig in 1814, and the lease under the bishop had then become vested in him, and he obtained renewals of it. On a bill filed against him in 1815, by the annuitants, praying a sale for payment of arrears then due, orders and decrees were made, appointing a receiver of the rents and profits of all the lands, to pay the annuities thereout, and declaring them to be a first charge on both descriptions of land, and ordering a sale of part to pay the arrears, unless Haig should pay the same in six months. On a supplemental bill by the annuitants, stating that they had discovered that the subleases had not been renewed, and praying that Haig might be ordered to renew them, a decree was made, ordering him to execute renewals on payment of the rents and fines due to him, the same to be a first charge on the lands in case of renewal; but if the annuitants should not pay the rents and fines, then their bill, as far as it prayed renewals of the subleases, to be dismissed with costs, and the freehold lands to be sold, subject to the annuities, for payment of the arrears. The annuitants declined to renew, finding the proceeds of the freehold lands, which were sold, a sufficient fund for their dividends: Held, (affirming decrees of the Court of Chancery) that the annuitants ought not to be compelled to renew the subleases, and that Haig was not entitled in justice, or in point of form, to be reimbursed by them personally, or out of the produce of the freehold lands, for the rents paid to them by the receiver out of the leasehold lands.—*Haig* v. *Homan*, 8 C. & F. 320.

EVIDENCE. See MARRIAGE ABROAD.

GUARANTEE.

(*Construction—General clause.*) A general clause in an agreement by surety to become liable for all receipts by the principal, may be qualified by reference to a clause, specifying the particular receipts intended to be the subject of the guarantee. Accordingly, where the receipts specified were on account of "ales to be shipped to London," but there was a general clause applicable to all receipts, it was held, that the surety was not liable for the proceeds of ales shipped before the agency began, but sold by the agent.—*Napier* v. *Bruce*, 8 C. & F. 470.

JURISDICTION. See LOCAL ACT.

LIS PENDENS.

(*General and particular actions.*) Where a party disputing a rate had instituted proceedings in the Sheriff's Court, to have the particular sum due from him declared, and the company claiming the rate then instituted a suit of *declarator* in the Court of Session, to have the general principle as to the calculation of the rate declared; it was held, even assuming the Court of Session to have jurisdiction, which in fact it had not, that a plea of *lis alibi pendens* did not hold.—*Balfour* v. *Malcolm*, 8 C. & F. 485.

LOCAL ACT.

(*Edinburgh Water Company's Act—Jurisdiction.*) The Court of Session has no jurisdiction in any "actions or suits arising out of this act," (59 G. 3, c. 116), but the jurisdiction in such cases is exclusively in the Sheriff's Court.—*S. C.*

MARRIAGE ABROAD.

(*Register at British embassy.*) The book kept at the British ambassador's hotel in Paris, in which his chaplain makes entries of the marriages of British subjects, has not the authenticity of a parish register, so as to make the attested copy of an entry in it admissible in evidence.—*Earl of Athlone's claim*, 8 C. & F. 262.

PARTNERSHIP.

(*Joint security—Death of one partner.*) Held, that a joint security given by three partners to a bank, to cover advances to be made to them, was, as to future advances, determined by the death of one partner, as to the estates of such partner comprised in the security; and that a heritable bond given by the heir of such partner *within a year after his death*, and over the estates of the father, to secure payment of future advances by the bank, was void under the Scotch act of 1661, as a bond given by an heir, for payment of his own debts, within a year after the death of the ancestor.—*Bank of Scotland* v. *Christie*, 8 C. & F. 211.

And see PAYMENT, 1.

PATENT.

(*Scotch patent.*) In order that a patent granted in Scotland may be valid, it is requisite that the invention should be new in England as well as in Scotland, and *vice versa*: decided on the authority of Roebuck v. Stirling, 4 Brown's Supp.—*Brown* v. *Annandale*, 8 C. & F. 437.

PAYMENT.

1. (*Appropriation.*) Where three partners gave a joint security to the bank for advances to be made to them on a cash account, and one of the partners died, the firm being then indebted, but afterwards the account was at one particular

time balanced by payments made to the bank: Held, that the estate of the deceased partner was discharged.—*Bank of Scotland* v. *Christie*, 8 C. & F. 214.

2. (*Transfer of right by waiver.*) Where the plaintiffs claimed a charge upon a fund in respect of payments made by their testator, which were chargeable on such fund, and such payments had not in fact been made, but the parties intitled to receive them consented, by their counsel, to take them as having been made: Held, that the benefit of the charge could not be transferred by such waiver.—*Lawrence* v. *Blake*, 8 C. & F. 504.

PRACTICE.

1. (*Appeal—Enrolment—Indulgence.*) Regularly no decree of any branch of the Court of Chancery can be appealed from, unless it has been enrolled; but where the appellant, who conducted his case in person, had been misinformed, at the Six Clerks' Office as to the necessity of enrolment, the appeal was ordered, with consent of respondents, to stand over for the purpose of enrolling the decree, without making the appellants pay the costs of the day.—*Andrewes* v. *Walton*, 8 C. & F. 457.

2. (*Cross appeal as to costs.*) *Quære*, whether there may be a *cross* appeal as to costs.—*Home* v. *Pringle*, 8 C. & F. 264.

3. (*Laches—Technical objections.*) The first decree in certain causes was made in 1813, and several other decrees and orders were afterwards made on the footing of that decree between 1813 and 1838, when a decretal order was made for the revival and execution of all previous orders and decrees. These decrees and the decree of 1838 were then appealed against: Held, that as to the original decrees, the House would not, after such a lapse of time, take notice of technical objections not affectiug the merits of the case.—*Lawrence* v. *Blake*, 8 C. & F. 504.

4. (*Non-appearance of appellant.*) The only order that can be made in such a case, is to dismiss the appeal for want of prosecution, with costs, but not to affirm the decree appealed against.—*Scanlan* v. *Usher*, 8 C. & F. 561.

5. (*Number of counsel—Different defences.*) Where two respondents had different defences, the House heard two counsel for one, on the whole case, and two for the other, on the points where the defences differed.—*Home* v. *Pringle*, 8 C. & F. 264.

PUBLIC OFFICE.

(*Assignment*) *Semble*, that the profits of a public office, such as the patent office of Keeper of the Register of Sasines, cannot be assigned for the benefit of creditors. In this case, it was held, that they were not included under the words "my whole means and estate, of whatever nature," which were used in the deed of assignment.—*Hill* v. *Paul*, 8 C. & F. 295.

SCOTCH MARRIAGE.

(*Defective acknowledgment.*) A man and woman cohabited in Scotland. During the intercourse, the man wrote to the woman in these terms: "Christy—You and I, having lived together as man and wife for some time, I hereby declare you to be my lawful wife in the event of a child being born in consequence of the present connection between us." This letter was not delivered till two years afterwards: Held, that there was no marriage: the Lord Chancellor observing, that the effect of an acknowledgment in such cases rested upon this, that it was evidence of the performance of a previous promise.—*Stewart* v. *Menzies*, 8 C. & F. 309.

SCOTCH TRUST.

(*Appointment of trustee as factor.*) *Quære*, how far the principle of English law, that a trustee cannot hold an office of profit under the trust (except with the express sanction of the Court), has been established in Scotland. *Quære*, also, as to the goodness of the principle.—*Home* v. *Pringle*, 8 C. & F. 264.

TRUST.

(*Appointment of trustee as factor—Negligence.*) Estates in *Scotland* were conveyed by trust disposition to three trustees, to collect and apply the rents as therein mentioned, with 100*l.* a year for their trouble, besides all the necessary expenses of managing the estates; and with power to appoint and remove factors, pay their salaries, and settle their accounts annually; and, within six months after clearance with the factors, to get their own accounts approved by an accountant, whose approbation would be a discharge to them; each being liable only for his own actual intromissions, and no farther liable for the factors than that they should be reputed responsible at the time of their appointment. The trustees appointed one of themselves to be factor, with a salary; and he, though of undoubted responsibility at that time, afterwards retained large balances at the annual settlements of accounts; whereon one of the trustees, who was cashier, urged him to pay up; but the balances against him increasing, both trustees, after failing in their exertions to obtain payment, revoked his appointment as factor, and he became bankrupt, owing a large debt to the trust estate: Held, by the Lords (affirming decrees of the Court of Session in *Scotland*, in an action raised by the first heir of entail, to whom the trustees were bound to account for their management).

1st, That the appointment of one of the trustees to be factor, even though it gave him no right to charge as factor, was not of itself such a breach of trust as subjected the other trustees to all the consequences of it.

2dly, That there was not such gross negligence, in the two trustees permitting the factor to retain balances, as to subject them to liability for the ultimate balance due from him to the trust estate: the Lord Chancellor observing, as to the first point, that the rule was the same in Scotland as in England.—*Home* v. *Pringle*, 8 C. & F. 264.

APPEALS ON REPORTED CASES.

MUNICIPAL CORPORATION ACT.

The decision of the Lord Chancellor in the case of Attorney-General v. The Corporation of Poole, reported 4 Myl. & C. 17, L. M. No. 48, establishing the jurisdiction of the Court of Chancery over the property of municipal corporations, affirmed.—*Parr* v. *The Attorney General*, 8 C. & F. 409.

PLEADING.

(*Multifariousness.*) The decision in the same case, that it was not multifarious to seek by the same bill to cancel a bond given to secure compensation, and also to seek protection against a rate made for paying such compensation, also affirmed.—*S. C.*

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EVENTS OF THE QUARTER.

A MORE than ordinary quantity of legislation, affecting professional interests, is in progress, but the Registration Bill is the only measure which has been received in such a manner as to insure its adoption by both Houses. Lord Brougham, indeed, threatened something like opposition or renewed discussion in the House of Lords, but his meteor-like mode of moving renders every thing connected with him a matter of uncertainty, and he is probably at this moment shaking hands with M. de Tocqueville at the French Institute. The Bill was altered for the better in many respects whilst before the committee; particularly by the substitution of the Common Pleas for the proposed Appeal Court; and it is perfectly surprising to us how a man of Sir Thomas Wilde's discernment can discover anything approximating to an encroachment on his darling privilege in such a provision, or how he could seriously contend for a moment that the House of Commons is likely to be oppressed by the judges or the Crown.

As regards the judges, a much more important consideration is, whether they will make a better use of the patronage; whether they will one and all select the men best qualified to perform the duties of revision. We earnestly hope they will; for every instance of undue partiality (not to say jobbing) will assuredly be marked, and probably turned into a topic of detraction against the bench. Each individual judge should always act as if the character of his order were confided to him.

Lord Campbell, who bids fair to rival Lord Brougham in restlessness if not in other matters, has brought in a bill to shorten conveyances, against which it would be no easy matter to adduce any argument likely to prove satisfactory to the public. A few years ago some enterprising reformer proposed that the marginal notes in Mr. Chitty's Treatise should do duty as pleadings; for example, that "plea of the Statute of Limitations" should have the same effect as if the statute were pleaded in form. Lord Campbell has caught up and adapted this notion to conveyancing; his proposition being, that an instrument in a given form shall be understood to comprise all the common covenants and words of description with which deeds are now unnecessarily crammed. Some members of the profession are frightened at this bill; but it strikes us that very few purchasers would be content to take under the proposed instrument; that it would simply facilitate transfers which cannot be completed at all, or are completed informally, in the present condition of conveyancing.

There is no denying that the commercial world are dissatisfied with the new bankruptcy system, and the Sheffield petition states grievances which must be felt by every town in the kingdom, with the exception of those in which the new commissioners are located. It sets forth:

"That in the course of the examination of a bankrupt, facts are often unexpectedly elicited, and books and other important documents spoken of or referred to, which are not before the Court; and hence it becomes necessary that some person should be instantly summoned to explain such facts or produce such books, and it is highly important that he should be examined before he can have an opportunity to communicate with the bankrupt then under examination.

"That under the former system local commissioners here frequently had occasion

to issue peremptory summonses to bring persons before them for examination during their then sitting, to the great advantage of the bankrupt's estate, and at little or no cost; whereas, with the Bankruptcy Court at Leeds, and the required witnesses in all probability residing in Sheffield, an adjourned meeting would be rendered necessary. A messenger must be despatched to Sheffield to summon such witness; the bankrupt, the assignees, and the solicitors must all return home; the bankrupt's estate be subjected to the expense of fresh journies, and in all probability the object sought to be obtained will be frustrated by intercommunication in the meantime between the party summoned and the bankrupt.

"That persons extensively engaged in business, and those best fitted for the appointment, will be increasingly unwilling to accept the office of assignee, from the fear of being wearied by the vexations and delays attending the new system, involving a sacrifice of time which unremunerated assignees cannot be expected to make."

The same topics are strongly urged in a petition from the solicitors of Warrington.

The question regarding the removal of the Courts from Westminster has been brought before the House of Lords in the shape of a petition from the Incorporated Law Society, and the Law Lords are divided upon the subject; Lords Cottenham and Langdale *pro*, Lords Brougham, Abinger, and Campbell, *con*. We are not aware whether the Lord Chancellor has yet declared for either side. We must take the liberty of repeating that the most formidable ground of objection is not the situation of the Courts, but the avowed inadequacy of the present accommodation and the want of space in the immediate neighbourhood for enlarging them.

We shall shortly see the Lord Chancellor caricatured by H. B. baking Queen's counsel, as Napoleon was caricatured by Gillray baking kings and queens of gingerbread. A new batch has just been drawn out, consisting of Mr. Talbot, Sir Gregory Lewin, Mr. Watson, Mr. Martin, and Mr. Roebuck. Mr. Serjeant Wrangham receives a patent of precedence.

A Local Court Bill has at length been brought in by Sir James Graham. We have not been able to obtain a copy, but we understand that a certain number of barristers will be commissioned to hold courts at proper intervals, with power to regulate the business in such a manner as to admit of their retaining their general practice. The amount of their jurisdiction is to be 10*l*.

We are tempted to record the fact that the Attorney-General, one of the most learned and occupied lawyers of his day, has recently addressed a letter on an abstruse mathematical question (a proof of the fundamental proposition of the ellipse and hyperbola) to the Secretary of the Royal Society, which was read before that illustrious body, and generally regarded as evidencing scientific attainments of a very high order. An event of this sort reflects honour on the bar.

A report on Criminal Law, including a digest or code, has been completed and presented by the remaining Commissioners, Mr. Starkie and Mr. Ker. It will be reviewed in our next number.

LIST OF NEW PUBLICATIONS.

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to issue peremptory summonses to bring persons before them for examination during their then sitting, to the great advantage of the bankrupt's estate, and at little or no cost; whereas, with the Bankruptcy Court at Leeds, and the required witnesses in all probability residing in Sheffield, an adjourned meeting would be rendered necessary. A messenger must be despatched to Sheffield to summon such witness; the bankrupt, the assignees, and the solicitors must all return home; the bankrupt's estate be subjected to the expense of fresh journies, and in all probability the object sought to be obtained will be frustrated by intercommunication in the meantime between the party summoned and the bankrupt.

"That persons extensively engaged in business, and those best fitted for the appointment, will be increasingly unwilling to accept the office of assignee, from the fear of being wearied by the vexations and delays attending the new system, involving a sacrifice of time which unremunerated assignees cannot be expected to make."

The same topics are strongly urged in a petition from the solicitors of Warrington.

The question regarding the removal of the Courts from Westminster has been brought before the House of Lords in the shape of a petition from the Incorporated Law Society, and the Law Lords are divided upon the subject; Lords Cottenham and Langdale *pro*, Lords Brougham, Abinger, and Campbell, *con*. We are not aware whether the Lord Chancellor has yet declared for either side. We must take the liberty of repeating that the most formidable ground of objection is not the situation of the Courts, but the avowed inadequacy of the present accommodation and the want of space in the immediate neighbourhood for enlarging them.

We shall shortly see the Lord Chancellor caricatured by H. B. baking Queen's counsel, as Napoleon was caricatured by Gillray baking kings and queens of gingerbread. A new batch has just been drawn out, consisting of Mr. Talbot, Sir Gregory Lewin, Mr. Watson, Mr. Martin, and Mr. Roebuck. Mr. Serjeant Wrangham receives a patent of precedence.

A Local Court Bill has at length been brought in by Sir James Graham. We have not been able to obtain a copy, but we understand that a certain number of barristers will be commissioned to hold courts at proper intervals, with power to regulate the business in such a manner as to admit of their retaining their general practice. The amount of their jurisdiction is to be 10*l*.

We are tempted to record the fact that the Attorney-General, one of the most learned and occupied lawyers of his day, has recently addressed a letter on an abstruse mathematical question (a proof of the fundamental proposition of the ellipse and hyperbola) to the Secretary of the Royal Society, which was read before that illustrious body, and generally regarded as evidencing scientific attainments of a very high order. An event of this sort reflects honour on the bar.

A report on Criminal Law, including a digest or code, has been completed and presented by the remaining Commissioners, Mr. Starkie and Mr. Ker. It will be reviewed in our next number.

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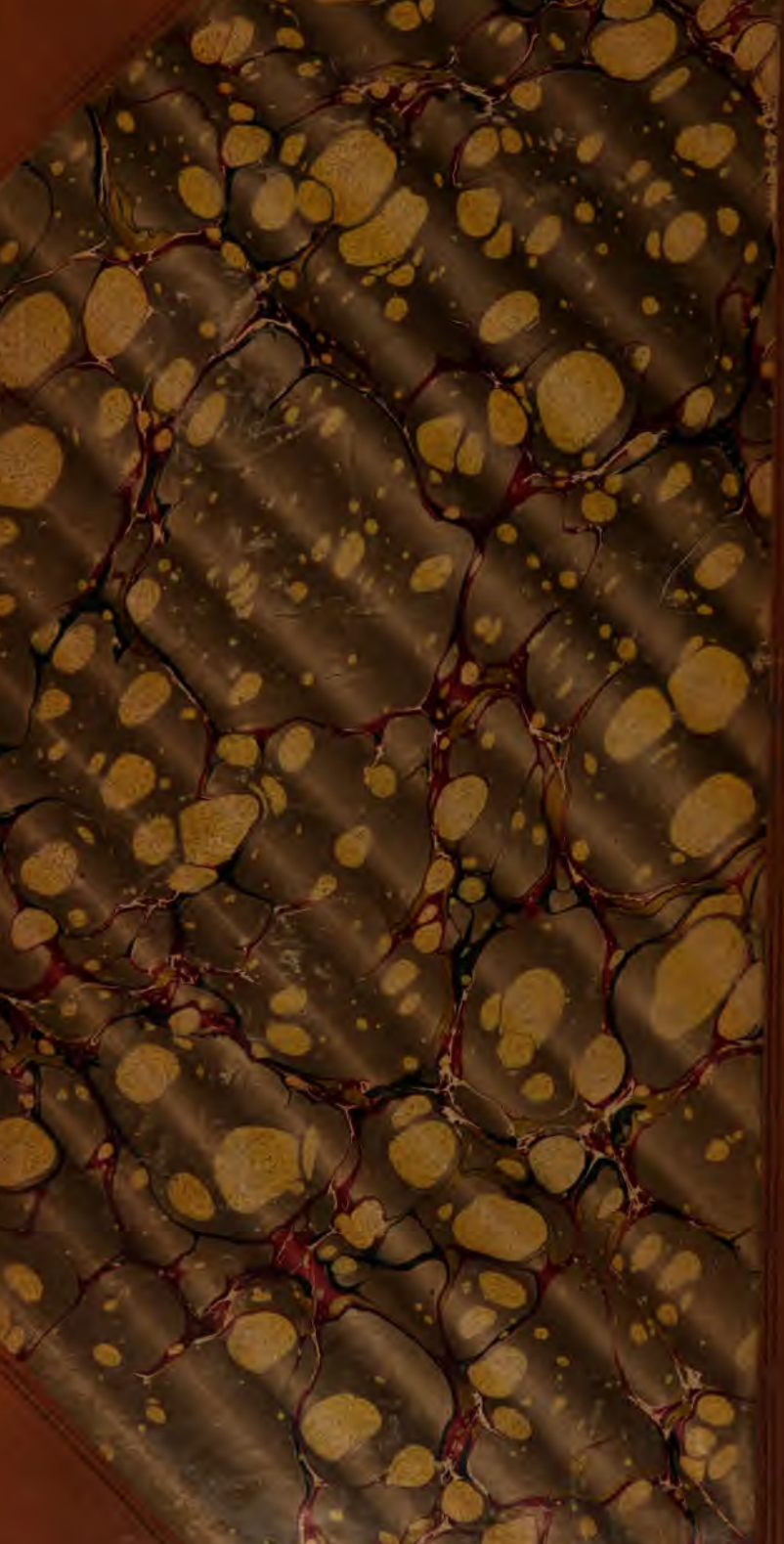
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